(25,773)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 943.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* NEW YORK AND QUEENS GAS COMPANY, PLAINTIFF IN ERROR,

vs.

EDWARD E. McCALL ET AL., COMMISSIONERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel., NEW YORK AND QUEENS GAS COMPANY, Relator-Respondent,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood and William Hayward, Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Appellants.

Papers on Appeal.

From Order of Appellate Division.

George S. Coleman, Counsel for the Public Service Commission, First District Attorney for Appellants, No. 154 Nassau Street, Borough of Manhattan, City of New York.

Shearman & Sterling, Attorneys for Relator-Respondent, No. 55 Wall Street, Borough of Manhattan, City of New York.

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 3rd day of October in the year of our Lord one thousand nine hundred and sixteen, before the Judges of said Court.

Witness, The Hon. Willard Bartlett, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur October 4, 1916.

THE PEOPLE, &c., ex Rel., NEW YORK AND QUEENS GAS CO., Respondent,

against

EDWARD E. MCCALL AND OTHERS, COMMISSIONERS, CONSTITUTING the Public Service Commission of the State of New York, for the First District, Appellants.

Be it remembered, That on the first day of April in the year of our Lord one thousand nine hundred and sixteen Edward E. McCall and others, Commissioners &c. the appellants in this proceeding came here unto the Court of Appeals, by George A. Coleman their attorney—and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme

Court in and for the First Judicial Department. And New York and Queens Gas Co. the respondent in said proceeding afterwards appeared in said Court of Appeals by Shearman & Sterling its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Compared by

M. W. AND S.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Arthur Du Bois of counsel for the appellants, and by Mr. John A. Garves of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and determination of the Public Service Commission affirmed, with costs in the Appellate Division and in this court.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, It is considered that the said order of the Appellate Division be reversed and determination of the Public Service Commission affirmed, with costs in the Appellate Division and in this Court, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, October 4, 1916.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

Compared by

M. W. AND S.

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Relator,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD and WILLIAM HAYWARD, Commissioners, constituting the Public Service Commission of the State of New York for the First District,
Respondents.

2

Statement Under Rule 41.

This proceeding was commenced by an order signed April 30, 1915, directing Writ of Certiorari to be issued.

3

Writ of Certiorari issued April 30, 1915.

Order and Writ of Certiorari served May 4, 1915.

Return filed October 18th, 1915.

The relator is the New York and Queens Gas Company.

The respondents are Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York for the First District.

There has been no change in parties.

4 **Writ of Certiorari.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Relator,

against

EDWARD E. McCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD and WILLIAM HAYWARD, Commissioners, constituting the Public Service Commission of the State of New York for the First District.

Writ of Certiorari.

5

The People of the State of New York:

To Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York for
6 the First District;

WHEREAS, we have been informed by the petition of New York and Queens Gas Company that said petitioner claims to be aggrieved and injured by erroneous and illegal orders made by you as such Public Service Commission for the First District on March 19, 1915, and on April 27, 1915, in and by which you ordered that said petitioner extend its gas mains and services in such a manner as may be required reasonably to serve with gas that community lying in the Third Ward of the Borough of Queens, City of New York, and known

as Douglaston, including Douglas Manor, that the construction of such proposed extension be begun not later than April 30, 1915, and be completed as far as Alley Road or Main Avenue, Douglaston, by September 1st, 1915, and that on or before April 30, 1915, said petitioner file with you a general plan or lay-out showing a proposed transmission and distribution system to be installed pursuant to the terms of said order; and 7

WHEREAS, we have also been informed by said petition that said petitioner thereafter in due form of law applied to you as such Public Service Commission for a rehearing of the matters decided and determined adversely to them in and by your said order of April 19, 1915, and that thereafter by an order made April 27, 1915, you denied a rehearing. 8

We being willing for sufficient reasons to be certified of your proceedings in the premises, DO HEREBY command you that within twenty days after due service of this writ upon you as said Public Service Commission, and as the commissioners or members of said Commission, you certify and return to us at the office of the Clerk of the County of New York, all and singular the record before you and the proceedings had by and before you in and upon the aforesaid proceedings which resulted in the orders made by you on March 19, 1915, and April 27, 1915, with your decisions and orders thereupon whenever made, together with all and singular the evidence, oral and documentary, submitted to you as such Public Service Commission upon all the hearings in connection with the aforesaid proceeding, with all your determinations, to the end that your proceedings, actions and decisions in the premises may be reviewed and corrected, and that our Supreme Court may cause further to be done there- 9

10 *Writ of Certiorari*

in what of right and according to law ought to be done, and have you then and there this Writ.

WITNESS, Honorable Peter A. Hendrick, one of the Justices of the Supreme Court of the State of New York, at the County Court House in the County of New York, the 30th day of April, 1915.

By the Court,

WM. F. SCHNEIDER,
Clerk.

11 KRAUTHOFF, HARMON & MATHEWSON,
Attorneys for Relator,
Office and Post Office Address,
55 Wall Street,
New York City.

(Endorsed):

The within Writ of Certiorari is hereby allowed this 30th day of April, 1915.

PETER A. HENDRICK,
Justice of the Supreme Court
of the State of New York.

12

Order Allowing Writ of Certiorari. 13

At Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in said County, on the 30th day of April, 1915.

Present: Hon. PETER A. HENDRICK, *Justice*.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY, Relator, 14

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD and WILLIAM HAYWARD, Commissioners, constituting the Public Service Commission of the State of New York for the First District.

15

On reading and filing the petition of the New York and Queens Gas Company, duly verified the 30th day of April, 1915, praying for a writ of certiorari directed to the persons above named, and on motion of Krauthoff, Harmon & Mathewson, attorneys for the petitioner, it is

ORDERED, that a writ of certiorari issue out of and under the seal of this Court directed to Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Com-

16 *Order Allowing Writ of Certiorari*

mission of the State of New York for the First District as prayed for in said petition, requiring and commanding them to make return within twenty days after the service of said writ in the office of the Clerk of the County of New York for record and all and singular their proceedings, orders, evidence, decisions and determinations in the matters stated in said petition herein.

Notice of the application for the writ of certiorari herein is hereby dispensed with.

Enter,

17 P. A. H.,
J. S. C.

(Entered April 30, 1915.)

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Petition for Writ of Certiorari. 19

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Relator,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD and WILLIAM HAYWARD, Commissioners, constituting the Public Service Commission of the State of New York for the First District,
Respondents.

Petition for Writ of Certiorari. 20

To the Supreme Court of the State of New York:

The petition of the New York and Queens Gas Company respectfully shows to the Court and alleges as follows:

I. That at all times subsequent to about the 21
12th day of July, 1904, your petitioner New York and Queens Gas Company was and it now is a corporation duly organized and existing under and by virtue of the Transportation Corporations Law of the State of New York, having an authorized issued and outstanding capital stock of $600,000 par value, and authorized by its charter to manufacture and supply gas for lighting streets and public and private buildings in the City of New York within the Borough of Queens, County of Queens and State of New York.

II. That on or about the 29th day of July, 1904, your petitioners acquired a certain plant and gas works located in the former village of Flushing in the Third Ward of the Borough of Queens, in the City of New York, together with a system of mains and service pipes for the distribution of gas from such plant and works to various portions of said ward, said plant, gas works and distributing system having been employed for many years by predecessor corporations in the manufacture and sale of gas in said ward. That on or about said 29th day of July, 1904, your petitioner also acquired various consents to lay conductors for conducting
23 gas through the streets, lanes, alleys, squares and highways of said ward granted to various individuals and corporations by the former municipal authorities having jurisdiction so to do prior to the consolidation of said Third Ward into and as part of the City of New York, and in particular acquired a certain franchise granted by the Commissioners of Highways of the former Town of Flushing to the Flushing Gas Light Company on the first day of May, 1897, wherein and whereby authority was granted to said Flushing Gas Light Company to lay its conductors, mains and pipes for conducting gas through, along, upon, over, under and across the public highways, roads, streets, lanes, avenues,
24 places and squares in the said Town of Flushing not included in any incorporated village for the purpose of lighting public highways, roads, streets, lanes, avenues, places and squares and public and private buildings, upon the conditions, (1) that said corporation should at no time disturb or break the earth, pavement or macadam or flagging therein for the purpose of laying any conductors, mains or pipes without first having obtained the written permit of the Commissioners of Highways of said

Town or their lawful successors; (2) that said corporation should in no case lay any conductor or main until the line of such conductor or main in such highway, road, street, lane, alley, avenue, place or square should have first been located on the ground therein by the Commissioners of Highways of the Town of Flushing, or their lawful successors; and (3) that such consent should terminate with the expiration of fifty years from the date thereof.

III. That since the month of July, 1904, your petitioner has operated the gas works, plant and distributing system so acquired by it and has from time to time extended, enlarged and improved the same and that your petitioner is now engaged in the manufacture and sale of gas for public and private purposes in various portions of the Third Ward of the Borough of Queens.

That your petitioner has no mains or service pipes in that portion of said Ward known as Douglaston, including Douglas Manor, or Little Neck, all of which communities lie east of Alley Creek and are separated from the other territory served by your petitioner by the waters of Alley Creek and low marshy land along the banks of the same and by the waters of Little Neck Bay.

That the nearest mains of your petitioner to said communities extend only to Bayside on the west side of Alley Creek and are distant one and one-half miles from the nearest portions of said communities.

IV. That on the 23d day of July, 1914, and at all times subsequent thereto, the Public Service Commission of the State of New York for the First District consisted of the following commissioners, to wit: Edward E McCall, Chairman, Milo R. Maltbie, J. Sergeant Cram, George V. S. Williams

and Robert C. Wood, except that on or about the 1st day of April, 1915, the term of office of said Milo R. Maltbie expired and William Hayward was duly appointed a member of said Commission in the place of said Milo R. Maltbie and has since acted as such, and that such Commission now consists of Edward E. McCall, Chairman, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward.

V. That on or about the 23d day of July, 1914, the Public Service Commission for the First District as then constituted, upon its own motion gave notice of a hearing for the purpose of inquiring and determining whether an order should be made directing your petitioner to extend its gas mains, services and other apparatus to such extent as might be necessary to furnish gas to the residents of Douglaston and Little Neck in the Borough of Queens, City of New York, and that pursuant to such notice, hearings were held on said question before said Commission on the 29th day of July, 1914, and on other days to which said hearing was adjourned, at which hearings evidence was adduced by said Commission in support of such proposed extension and evidence was adduced by your petitioner in opposition thereto.

VI. That on the 19th day of March, 1915, said Commission as then constituted made its order whereby it was directed that your petitioner extend its gas mains and services in such a manner as may be required reasonably to serve with gas that community lying in the Third Ward of the Borough of Queens, City of New York, and known as Douglaston, including Douglas Manor; that construction of said proposed extension be begun not later than April 30, 1915, and be completed as far

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as Alley Road or Main Avenue, Douglaston, by September 1st, 1915, and that on or before April 30, 1915, your petitioner file with said Commission a general plan or lay-out showing a proposed transmission and distribution system to be installed pursuant to the terms of said order. That a copy of said order is hereto annexed and marked "Exhibit 1."

That accompanying said order said Commission filed an opinion written by Commissioner Maltbie, a copy of which is hereto annexed and marked "Exhibit 2," which opinion was adopted by the vote of Commissioners Cram, Williams, Maltbie and Wood.

32

That Chairman McCall voted against the adoption of said opinion and caused the following minute to be entered upon the record in said proceedings:

> "Record me in the negative on the ground that it is an unreasonable order in that the expense cannot possibly be met within a reasonable time and the company would not receive a reasonable return upon the cost of the extension."

VII. That thereafter and on or about the 10th day of April, 1915, your petitioner duly filed with said Public Service Commission for the First District its duly verified petition praying for a rehearing upon said order on the grounds that said order was unjust and unreasonable and amounted substantially to a confiscation of the property of your petitioner; that said order was illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it deprived your petitioner of its property and denied to your petitioner the equal protection of

33

34 *Petition for Writ*

the laws; that the evidence presented in said proceeding was insufficient to justify the issuance of said order; that said order was arbitrary and oppressive and that the extension required to be made by said order was not a reasonable improvement or a reasonable extension within the meaning of Subdivision 2 of Section 66 of the Public Service Commissions Law; and upon the further ground that said Commission erred as in said petition more particularly set forth. That a copy of said petition for a rehearing is hereunto annexed marked "Exhibit 3."

35 VIII. That on the 27th day of April, 1915, said Public Service Commission for the First District made an order denying the aforesaid application for a rehearing; that a copy of said order denying the application for a rehearing is hereunto annexed and marked "Exhibit 4."

That said order of March 19, 1915, now remains in full force and effect to the harm, prejudice and detriment of your petitioner, in that your petitioner upon competent evidence submitted by it in said proceeding was lawfully entitled to have said Commission refuse to require the extension by said order directed to be made and to have said Commission refuse to order any extension whatsoever to the territory involved in said proceeding, and
36 that said order of March 19, 1915, was and is erroneous and unlawful and thereby your petitioner was and is harmed, injured, prejudiced and aggrieved.

IX. Upon information and belief, that the fair, reasonable and necessary cost of the extension to Douglaston, including Douglas Manor, required by said order, will amount to upwards of $70,000, and that the annual return therefrom to your petitioner,

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exclusive of any return upon plant or working capital will not exceed $782.40 or 1 12/100% for many years to come.

X. And your petitioner further alleges upon information and belief:

1. That said order of said Commission dated March 19, 1915, is unjust and unreasonable in requiring your petitioner to invest capital in an extension upon which capital, according to law and according to the evidence and to the weight of evidence in said proceeding, your petitioner will not be able to earn a fair and reasonable return at the rate for gas prescribed by law and that said order amounts substantially to a confiscation of the property of your petitioner.

38

2. That said order is illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States in that it deprives your petitioner of its property without just compensation and denies to your petitioner the equal protection of the laws.

3. That the evidence presented in said proceeding is insufficient to justify the issuance of said order.

4. That said order is arbitrary, oppressive and unreasonable.

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5. That the extension required to be made by said order is not a reasonable improvement or a reasonable extension within the meaning of Subdivision 2 of Section 66 of the Public Service Commissions Law.

6. That the authority conferred by law upon said Commission in relation to the subject matter of said proceeding has not been pursued in the

mode required by law in order to authorize it to make said order and the determination therein contained, and that said order and determination are contrary to law, contrary to the evidence and to the weight of evidence and that there was no competent proof of the facts necessary to be proved in order to authorize the making of said order and determination.

7. That the said Commission had no power or authority to make the said order.

XI. And your petitioner further alleges upon information and belief that said Commission further erred in said order of March 19, 1915, and in the opinion rendered therewith in the following particulars, viz.:

1. That said Commission erred in holding that extensions by gas companies may be required when they will not earn a return of 6 per cent. upon the cost thereof.

2. That said Commission erred in assuming that your petitioner is obliged to supply the outlying parts of the territory covered by its franchises as soon as building operations have progressed far enough to justify the extensions without charging against the business the cost of mains necessary to supply such extension back to the gas works of your petitioner.

3. That the estimates of the Commission as to the cost of the extension to the entire territory involved in said proceeding, of the probable consumption of gas upon such extension and of the return therefrom to your petitioner are contrary to law, contrary to the evidence and to the weight of evidence.

4. That said Commission erred in requiring the proposed extension to be made when upon the figures assumed by the Commission the net return from an extension to the entire territory involved in said proceeding would be but 4 per cent. per annum.

5. That said Commission acted contrary to law and contrary to the evidence and to the weight of evidence in assuming to eliminate from the cost of the extension required by said order the cost of mains from Flushing to Bayside necessary to supply such extension.

6. That said Commission acted contrary to law 44
and contrary to the evidence and the weight of evidence in assuming that the entire cost of the extension required by said order is not properly chargeable against such extension, and in further assuming that the backbone of the present system of your petitioner is inadequate and that additional mains will need to be laid or the old mains rebuilt in order to take care of the increased consumption which will come in the district west of Alley Creek.

7. That said Commission erred in assuming to make said order without having found any facts to justify the same.

8. That said Commission erred in ordering your 45
petitioner to make an extension so as to serve Douglaston, including Douglas Manor, upon evidence relating to the cost of an extension to the entire territory involved in said proceeding, of which Douglaston and Douglas Manor form only a part and without any evidence as to the separate cost of an extension to Douglaston, including Douglas Manor.

9. That said Commission erred in basing its opinion upon statements made and evidence given

in another proceeding before the Commission (*Purchase of Stock by Consolidated Gas Co., 4 P. S. C. R.*, [1st Dist., N. Y.] 231).

10. That said Commission acted contrary to law and contrary to the evidence and to the weight of evidence in assuming that your petitioner has selected the most profitable parts of the Third Ward of the Borough of Queens for its operations and has left the less profitable areas to look out for themselves.

11. That said Commission acted contrary to law and contrary to the evidence and to the weight of
47 evidence in ordering extensions to be made by your petitioner through streets which are private streets, or are not shown to be public streets.

12. That said Commission erred in ordering your petitioner to make extensions through streets, the location of and map for which have not been finally adopted by the Board of Estimate and Apportionment of the City of New York.

13. That said Commission erred in ordering your petitioner to file with the Commission a general plan or lay-out showing a proposed transmission and distribution system to be installed pursuant to the terms of said order.

48 XII. That said orders of the said Public Service Commission constitute a final determination of the rights of your petitioner; that said orders cannot be reviewed by an appeal to any court or to any other body or officers; that your petitioner has no other remedy to review said orders except by writ of certiorari issued from this Court directed to said Commission, requiring that body duly to return to this Court the record and all and singular the proceedings, orders, evidence and decisions in the premises; that less than four calendar months

have elapsed since said determination was made and became final and binding; that the time has not elapsed within which a writ or certiorari may be issued under the statute in such case made and provided, and that no other or previous application for such writ has been made to any court or judge.

WHEREFORE, your petitioner prays that a writ of certiorari may be granted by and issued out of this Court, directed to the persons herein named, constituting the Public Service Commission for the First District of the State of New York, and to said Commission, requiring and commanding them to certify and return to this Court the record and 50
all and singular the proceedings had by or before them in and upon the hearing and determination in the aforesaid proceedings before said Commission and which was determined in and by the said orders made by said Commission on March 19, 1915, and April 27, 1915, together with all the testimony and evidence upon which they proceeded or arrived at their determination in the premises, to the end that the said orders of March 19, 1915, and April 27, 1915, may be reviewed and reversed, vacated, annulled, set aside or modified; and that your petitioner may have such other or further relief as to the Court may seem just.

And your petitioner will ever pray, etc.

NEW YORK AND QUEENS GAS COMPANY, 51

By MAYNARD H. SPEAR,
Secretary and General Manager.

KRAUTHOFF, HARMON & MATHEWSON,
Attorneys for Petitioner,
Office and Post Office Address,
No. 55 Wall Street,
Borough of Manhattan,
City of New York.

52 *Petition for Writ*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MAYNARD H. SPEAR, being duly sworn, deposes and says, that he is an officer, to wit, the Secretary and General Manager of New York and Queens Gas Company, the above-named petitioner; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

That the reason this affidavit is not made by
53 petitioner but is made by deponent is that petitioner is a domestic corporation and deponent is an officer thereof. That the sources of deponent's information and the grounds of his belief as to all matters not stated upon his own knowledge are investigations made by deponent and reports made to him in his official capacity by other officers and agents of the petitioner who have investigated the matters and things in said petition referred to and set forth.

MAYNARD H. SPEAR.

Sworn to before me this }
30th day of April, 1915. }

54

CHAS. RICHTER,
(Seal) Notary Public No. 77.
New York County.

Exhibit No. 1.

Order of Public Service Commission.

At a Stated Meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 19th day of March, 1915.

Present:

EDWARD E. MCCALL, *Chairman*,
MILO R. MALTBIE,
J. SERGEANT CRAM,
GEORGE V. S. WILLIAMS,
ROBERT C. WOOD,
Commissioners.

In the Matter

of

hearing on the motion of the Commission on the question of the extension of the gas mains of NEW YORK AND QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.

Case No. 1856.
Order.

A hearing having been held in this proceeding on July 29th, August 13th, August 27th, September 2nd, September 9th and October 6, 1914, James S. Brownson, appearing for the Douglaston Civic Association, Joseph W. Dolittle, appearing for the Douglaston Realty Company, F. H. Reeve, appear-

ing for Joseph P. Day, agents for the Dwight and Murray Realty Company, John M. Riehle, representing the Long Island Sound Realty Company, John A. Hardman, appearing for the Douglas Manor Association, Charles F. Mathewson and Edward J. Patterson appearing as counsel for the New York and Queens Gas Company, Arthur DuBois, Assistant Counsel to the Commission, attending, and the Commission being of the opinion after said hearing that the mains and services of the New York and Queens Gas Company should be extended to serve residents of Douglaston, including Douglas Manor, with gas.

59 ORDERED that the New York and Queens Gas Company, be and hereby is directed to extend its gas mains and services in such a manner as may be required reasonably to serve with gas that community lying in the Third Ward of the Borough of Queens, City of New York and known as Douglaston, including Douglas Manor.

FURTHER ORDERED that construction on the said proposed extension be begun not later than April 30, 1915, and be completed as far as Alley Road or Main Avenue, Douglaston, by September 1, 1915.

FURTHER ORDERED that on or before April 30, 1915, New York and Queens Gas Company file with
60 this Commission a general plan or layout showing a proposed transmission and distribution system to be installed pursuant to the terms of this Order, that shall be suitable and adequate to furnish reasonable service to the community known as Douglaston, including Douglas Manor, and that this extension be completed and in service not later than September 10, 1915.

FURTHER ORDERED that this Order shall take effect forthwith and that within ten days after service

thereof said New York and Queens Gas Company notify the Commission in writing whether the terms of this Order are accepted and will be obeyed.

BY THE COMMISSION,
TRAVIS H. WHITNEY,
(L. S.) Secretary.

Exhibit No. 2.

Opinion of Public Service Commission.

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT. 62

In the Matter

of the

Hearing on the Motion of the Commission on the question of the extension of the gas mains of New York & Queens Gas Company to such extent as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York. } Case No. 1856. 63

MALTBIE, Commissioner: This proceeding was instituted by the Commission at the request of citizens, property owners, real estate companies and civic associations in certain districts, commonly known as Douglaston, Douglas Manor, Little Neck and Little Neck Hills. These districts adjoin one another and are located in the extreme northeaster-

ly part of the Third Ward of the Borough of Queens. They are bounded on the north by Little Neck Bay and on the east by Nassau County, the dividing line being the boundary of the City of New York. Upon the west are Little Neck Bay and Alley Creek, which is a navigable stream for a short distance, surrounded by rather low land. To the south lie other districts in the Borough of Queens.

At the present time, the district from which the complainants come is supplied with electric current, water, and telephone and telegraph service. A branch of the Long Island Railroad system and a trolley line extend through it. Gas is not supplied
65 to any part, and it is the only important public utility which does not anywhere exist. Gas is supplied in Bayside, just west of Alley Creek, but no mains have been laid east of Little Neck Bay or Alley Creek.

The complainants, having been unable to persuade the New York & Queens Gas Company to extend its mains, have asked the Commission to issue an order compelling the company to lay mains and services in the areas in which they reside. They assert that the service will be a great benefit to them, that they are unable to secure gas from any other company, that it is the duty of the company to make such extensions, that the income from ad-
66 ditional sales will yield a reasonable profit within a short time, and that the number of consumers and the consumption of gas will steadily increase, bringing to the gas company increased profits.

The company is opposed to the construction of additional mains and services unless the residents will deposit a certain amount to cover the cost of construction, such deposit to be repaid semi-annually in payments of 25 per cent of the gas bills of consumers on the new lines. The company claims

that it is not required by law to make the extensions, that they can not reasonably be required by the Commission, that the return upon the cost of construction will be less than a reasonable profit, and that the growth of the area will not be such as to produce a fair rate of return within the near future.

Powers of Commission.

Prior to the enactment of the Public Service Commissions Law, the only statutory provision requiring gas companies to extend their mains appears to have been the provision contained in Section 62 68
of the Transportation Corporations Law, to the effect that upon application of the owner or occupant of a building or premises "within one hundred feet of any main laid down by any gas light corporation," the corporation shall supply gas to such applicant.

The Public Service Commissions Law as enacted in 1907 did not contain any specific provision authorizing the Commission to order gas companies to extend mains. Section 72 provided that after hearing and investigation the Commission might, "within lawful limits," order such improvements in the "manufacture or supply" of gas as would in its judgment improve the service. In 1910, this section
was amended by inserting the word "distribution," 69
so that the Commission was authorized to order improvements in the "manufacture, distribution or supply" of gas. At the same time Subdivision 2 of Section 66 was amended so as to give specific jurisdiction to order extensions. The Commission was given power to

> "examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distribut-

ing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities."

71

The jurisdiction given under Section 72 contemplates a proceeding or investigation instituted upon complaint of the form prescribed in Section 71, namely, complaint of the mayor of the city or not less than one hundred customers of the company against which complaint is made. The jurisdiction given by Subdivision 2 of Section 66, however, is under the general powers of the Commission in respect to gas and electricity. No particular form of complaint, and no complaint at all, is required under this Section.

It is clear, therefore, that the company can not be compelled, under the 100-foot clause of the
72 Transportation Corporations Law, to make the desired extensions, the desired extensions being more than 100 feet; but it is equally clear that the Public Service Commission has the power to order extensions, provided they are reasonable improvements and extensions.

INTERCORPORATE RELATIONS.

The New York & Queens Gas Company has franchises authorizing it to manufacture, distribute

and sell gas in the entire Third Ward of the Borough of Queens, and it is the only company that has a franchise for any part of this area. The New York & Queens Electric Light & Power Company is the only company having the right to supply electricity in this ward, and both companies are controlled through stock ownership by the Consolidated Gas Company. This fact throws considerable light upon the attitude of the gas company, for the statement is made that the complainants can use electricity for lighting and that there is, consequently, no public necessity for the extension of gas mains for lighting purposes. But it is impracticable to use electricity for heating and it is 74
possible that if the electric light and gas companies were controlled by hostile or separate interests, there would be a greater desire upon the part of the gas company to extend its mains, and the competition for business upon the part of each might be keener.

In view of the statements made by representatives of the Consolidated Gas Company in another case, it is surprising that the present management of the New York & Queens Gas Company has refused to extend its mains to Douglaston. About two years ago, the Consolidated Gas Company applied to the Commission for authority to purchase all of the capital stock of the New York & Queens 75
Gas Company and all of the common and preferred stock of the New York & Queens Electric Light & Power Company. The principal reasons urged by the applicant for the approval of its petition were that the plant and facilities of the Queens Gas Company would be made adequate to the needs of the rapidly growing population in the area of supply, and that, without the assistance of the Consolidated Gas Company, the Queens Company would

have great difficulty, and perhaps find it impossible, to finance the cost of improvements and extensions.

In the opinion which I wrote in the case (see *Purchase of Stock by Consolidated Gas Co., 4 P. S. C. R.* [1st Dist., N. Y.] 231), I pointed out that the Commission had received no complaint regarding the extension of mains and services by the New York & Queens Gas Company which had not been adjusted and that the management of the company had never pleaded poverty or financial difficulties as a reason for failure to make extensions. I said (pp. 242-4):

77 "It is apparent, further, that if the Queens Company is controlled by the Consolidated Gas Company, the policy upon this point will not be more liberal, for Mr. Carter, who is one of the vice-presidents and secretary of the Consolidated Gas Company, and who was the only witness for the petitioner in this proceeding, said that, unless the expenditures for additions and extensions of its (the company's) property will pay a return upon bonds at par, they should not be made." In other words, unless an extension will pay its carrying charges, it ought not to be built. It is obvious that, if the company is to draw the line at this
78 point, if none is to be constructed unless it will pay, any company can secure funds wherewith to build extensions."

* * * * * *

"It is doubtful, therefore, whether the Queens Company and the consumers whom it serves would gain anything through being financed by the Consolidated Company, for it is almost certain that whatever gain came

> through that source would accrue to the benefit of the Consolidated Gas Company, and not to the Queens Company or the public."

What I then feared will, apparently, come to pass, unless the new management (indirectly the Consolidated Gas Company) is required by the Commission to make the extensions necessary to serve the Douglaston area. The Queens Company now takes the position that it ought to be assured that it will earn at least 6 per cent. on the entire cost of the extension before it be required to construct such extension. But who thinks that the previous 80
management of the company would have found it difficult to raise funds for an extension which would earn at least 6 per cent. from the start?

However, the application of the Consolidated Gas Company was approved by a vote of three to two (Chairman McCall, Commissioners Cram and Williams voting for the order and Commissioners Eustis and Maltbie against). The majority of the Commission considered that the public would be benefited through control by the Consolidated Gas Company. Commissioner Williams, writing for the majority of the Commission, said (*ibid.* 234):

> "No one will seriously contend that the applicant company is not by far the stronger 81
> company, and it is clear from the evidence that much capital will have to be expended to keep pace with the rapid development of the borough."

If the people in this section of the Borough of Queens are to be benefited by the transfer of control to the Consolidated Company, it would seem that this is an opportune moment. It is surprising

that so soon after the decision permitting the Consolidated Company to acquire control of the New York & Queens Gas Company, that Company should refuse to make extensions to Douglaston unless it is assisted financially by the consumers themselves, for the company states that it is willing to build the new main, provided the consumers or some one will advance the money and will accept repayment month by month to the extent of 25 per cent. of the gas bills.

FRANCHISE OBLIGATIONS.

83 When the company accepted franchises for the whole of the Third Ward, it assumed certain obligations. The company may not have obligated itself to lay mains throughout the entire area regardless of the density of population, but it certainly can not go to the other extreme, select the most profitable parts and leave the less profitable areas to look out for themselves. At present, however, it assumes very much such an attitude towards the Douglaston area. The company is supplying gas to other areas which are populous and easily supplied. Even Bayside, a suburban development immediately to the west of Douglaston, receives gas. It will always be expensive to lay mains to serve the Douglaston area, for Alley
84 Creek and the Bay intervene, and the gas works have been located by the company far from this section. The existing distribution system is not adequate to supply Douglaston in addition to the other areas now being supplied, and long mains must be built not merely from the ends of the mains to the west of Douglaston, but far back to the gas works.

Apparently, these conditions will continue. The topographical situation can not be changed, and

the distribution system is not likely soon to be rebuilt. If the company's position is sound, the residents of the Douglaston area can not obtain gas until their district becomes so populous that the new business will earn 6 per cent. on the cost not only of the mains in their own territory but of the mains clear back to the works. If the works are located far enough away, this day will be very far distant; and yet the company in the meantime holds franchises in reserve, building upon them as it wishes. Is it fair for a company to select the most profitable areas and then contend before this Commission that it should not be required to build elsewhere unless the new business will earn 6 per cent on the cost of construction? This principle has been rejected by the Commission in the case of street railways, and the Commission's decision has been approved by the courts." *In the case of extensions by the gas companies, the Commission does not accept the rule that every extension must earn at least 6 per cent on its cost, as expressing the will of the Legislature or what may fairly be required by the Commission.* 86

A case very similar to the one now under consideration has recently been decided by the Connecticut Public Utilities Commission. A resident of the Town of Woodbridge where the United Illuminating Company had authority to supply electricity, filed a complaint with the commission because the company would not extend its lines to supply current to the complainant. It appeared that the complainant lived about a mile and a quarter from the nearest service, that the number of possible patrons within this distance was eight or ten, that the company had offered to extend its lines if complainant or others would guarantee an annual consumption of current amounting to $300 87

on this extension and would pay one-half the cost of construction, that the complainant had refused the offer, and that he had demanded service at the same rates others were paying without further expense to him and without any guaranty. The Commission granted his request, saying in its opinion (*Docket No. 1126, In the Matter of Petition of Clifford I. Stoddard, of Woodbridge, Alleging Unreasonable Failure and Refusal of the United Illuminating Company of New Haven to Furnish Him with Adequate Service at Reasonable Rates,* Decided March 5, 1914):

89 "When a charter is granted a public service company, and the company operates under the privileges granted by the charter, it seems reasonable to demand that it furnish service in parts of its territory which may be of less than average remunerativeness as well as in territory which may yield it an exceptional profit. By virtue of its charter it precludes from the field any other company which might be willing to furnish the desired service in that part of its territory which for itself is less profitable or not profitable at all. Within certain limits, therefore, the Commission feels that it is equitable to require such a company to extend its service
90 into territory which promises but small return, and it is within its judgment to define what limits are equitable in any particular case.* It does not follow, however, that a public service company should be required to extend its lines and supply service, at a

*See *Mahon* v. *New York Railways,* 3 P. S. C. R. (1st Dist. N. Y.), 214; *Public Service Com'n* v. *N. Y. Railways Co.,* 77 Misc., 487.

very large expense in proportion to the income received for such service, to every inhabitant located within its chartered territory. It is impossible to lay down a general rule for guidance of a company or prospective patrons because in extreme cases any general rule would work an injustice to one or the other of the parties.

"In the present instance it is conceded that the proposed extension may not at first, and perhaps never will be a valuable addition to the plant of the company. This fact, however, and the possibility of such unprofitable 92
extensions might have been foreseen by the company when it undertook to secure a charter amendment giving it rights in the Woodbridge territory. The fact that it did seek and secure such an amendment, thus precluding possible rivals from the territory, would justify the inference that for some reason it desired to cover this territory even in the face of the possibility of being required to make extensions of doubtful profit.

"We do not find however, that the probable expense of extending the line as desired by petitioner and of maintaining the same and furnishing the required service would be greatly disproportionate to the probable 93
returns. We believe that whatever risk there may be of unprofitable operation of this extension should be borne in this instance by the company rather than by the prospective patrons, and we can see no reason in this case for such patrons sharing in the cost of the extension."

CAPITAL INVESTMENT.

The company contends that there is no prospect of a reasonable return upon the new investment within a reasonable time. It is important to examine the data upon which this contention is based.

The Company has submitted through Mr. Spear, secretary and general manager an estimate of the cost of a distribution system to supply all of the houses in the Douglaston district. The net amount is $66,371.69, to which he has added $20,000, or about 30 per cent, for engineering, superintendence,
95 contingencies, other overhead charges and interest and taxes during construction, making the total estimated cost $86,731.69. Mr. Hine, the chief gas engineer of the Commission, estimated the cost of the same work at $61,004.80, including all of the charges covered by the other estimate. Mr. Spear made an estimate some months ago in which he stated that the cost of the work would be about $43,000, but this estimate did not include, it is said, as many connections with houses as are now under consideration. The difference between Mr. Spear and Mr. Hine is principally in the estimated allowances for contractor's profit, engineering, superintendence, contingencies, etc. In our opinion, Mr. Spear's estimate is too high. Probably $70,000 or $75,000
96 would be ample, assuming the work is done with thrift and economy without adding unnecessary items; and if certain houses which are rather isolated and perhaps beyond what might reasonably be required were omitted, the total cost would probably be about $65,000.

However, the entire cost, whatever it may be, is not properly chargeable against the plan which the complainants are asking the company to accept. As already stated, the company is supplying gas in

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Bayside, the present mains extending as far east as Lawrence Boulevard and Tenth Street, which is, about one mile from Broadway and Main Avenue in Douglaston, the nearest point in the territory now desiring service. The company states that the distribution system in Bayside is not adequate to supply additional territory in Douglaston, and that it would be necessary to lay a transmission line all the way from the works in Flushing to Douglaston (about 30,000 feet of main) in order to provide adequate service. This can only mean that the backbone of the present system is inadequate and that additional mains will need to be laid or the old mains rebuilt in order to take care of the increased consumption which will come sooner or later in the district west of Alley Creek. Further, if additional mains are laid from the works to Douglaston, these can be used as population grows to supply not only Douglaston but the intervening territory. It is not fair or reasonable, therefore, that the Douglaston business should be charged with all of the cost of the mains from Flushing to Douglaston. If the company had an adequate transmission system capable of being extended in a natural manner to take care of the consumption in outlying districts as rapidly as they are built up, it would not be necessary to construct a new transmission line from the works to the new territory. A company having exclusive rights to supply a district is certainly obligated to supply outlying parts of such territory as soon as building operations have progressed far enough to justify the extension without charging against the business the cost of mains clear back to the works.

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Eliminating the part of the expense due to the construction of transmission lines from the Bayside territory to Flushing, it is probable that the cost

of the distribution system east of Bayside would not be over $40,000 or $45,000.

ESTIMATED CONSUMPTION.

The company has prepared several estimates of the probable consumption in the Douglaston area. Upon the basis of 332 houses (there are apparently about 20 more), Mr. Spear estimated that the total annual consumption would be 6,075,000 cubic feet. Upon the same basis, the consumption for 352 houses would be 6,405,000 cubic feet. The company claims, however, that it would not be possible to
101 induce every householder to become a gas consumer, that 85 per cent is about as high as could be expected, even with persistent canvassing, and that 60 per cent would more nearly represent the usual condition. Upon the basis of 85 per cent and the average consumption assumed above, the company estimates that the total sales would be 5,444,250 cubic feet, and on the basis of 60 per cent, 3,843,000 cubic feet.

The average consumption upon which these figures are based is about 18,000 cubic feet per year, which, at the rate of $1.00 per 1,000, would mean an average monthly bill of $1.50. This seems too low in view of the generous size and substantial character of the houses in the Douglaston territory
102 and the probability that gas would be used largely for cooking and heating.

The net return to the company during the year 1913, after deducting operating expenses, taxes, etc., but not interest and dividends, was 27.3 cents per 1,000 cubic feet sold, according to the annual report. Upon this basis and upon the estimated consumption given by Mr. Spear, the company computes that it would earn only 2 per cent upon the total new investment, using Mr. Spear's estimate

of the total cost; that they would earn only 1.7 per cent if 85 per cent of the residents used gas, and only 1.2 per cent if 60 per cent of the residents used gas.

Assuming a net investment chargeable against the Douglaston business of $45,000, a total consumption of 6,405,000 cubic feet, the percentage of net return on such investment would be over 3½ per cent. If only three-quarters of the residents became consumers and if their average consumption amounted to 25,000 cubic feet per annum (equivalent to an average bill of about $2.00 per month), the net return on the new investment would be 4 per cent. 104

Of course, all figures of probable cost and consumption are only estimates, and it is impossible to compute with accuracy the exact cost or the exact consumption, but these figures seem to be reasonably conservative, and in view of the probable increase in the consumption and profits as the territory grows, and in view of the other factors already discussed, *it seems reasonable that the company should be required to extend its distribution system to the Douglaston territory.*

MILO R. MALTBIE.

October 28, 1914. 105

106 **Exhibit No. 3.**

Petition to Public Service Commission for Rehearing.

Public Service Commission

OF THE STATE OF NEW YORK

FOR THE FIRST DISTRICT.

In the Matter *of* Hearing on the motion of the Commission on the question of the extension of the gas mains of New York and Queens Gas Company to such extent as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.	Case No. 1856.

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To the Public Service Commission of the State of New York in and for the First District.

The petition of New York and Queens Gas Company respectfully shows:

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I.—That on the 19th day of March, 1915, this Commission made an order herein, directing that said Company extend its gas mains and services in such a manner as may be required reasonably to serve with gas that community lying in the Third Ward of the Borough of Queens, City of New York, and known as Douglaston, including Douglas Manor; that construction of said proposed extension be begun not later than April 30, 1915, and be completed as far as Alley Road or

Main Avenue, Douglaston, by September 1, 1915; that on or before April 30, 1915, said Company file with this Commission a general plan or layout showing a proposed transmission and distribution system to be installed pursuant to the terms of said order that shall be suitable and adequate to furnish reasonable service to the community known as Douglaston, including Douglas Manor, and that this extension be completed and in service not later than September 10, 1915; and that said order take effect forthwith and that within ten days after service thereof said Company notify the Commission in writing whether the terms of said order are accepted and will be obeyed. 110

II.—The New York and Queens Gas Company feels aggrieved and injured by said order and applies for a rehearing in this proceeding upon the following grounds:

1. That said order is unjust and unreasonable in that at the rate prescribed by law your petitioner will not be able to earn a fair and reasonable return upon the capital which will be necessarily invested in the making of the extension required by said order and that said order amounts substantially to a confiscation of the property of your petitioner.

2. That said order is illegal and void because 111
in contravention of the Fourteenth Amendment to the Constitution of the United States in that it deprives your petitioner of its property without just compensation and denies to your petitioner the equal protection of the laws.

3. That the evidence presented herein is insufficient to justify the issuance of said order.

4. That said order is arbitrary and oppressive.

5. That the extension required to be made by said order is not a reasonable improvement or a reasonable extension within the meaning of Subdivision 2 of Section 66 of the Public Service Commissions Law.

III.—And as further grounds of objection to said order and for a rehearing in this proceeding, your petitioner more particularly alleges that the Commission erred in said order and in the opinion rendered herein in the following particulars, all of which are also set forth as exceptions to said order and opinions, viz.:

113 1. In holding that extensions by gas companies may be required when they will not earn a return of 6% upon the cost thereof.

2. In assuming that your petitioner is obliged to supply the outlying parts of the territory covered by its franchises as soon as building operations have progressed far enough to justify the extensions without charging against the business the cost of mains necessary to supply such extension back to the gas works of your petitioner.

3. In assuming that the average consumption of gas in the territory involved in this proceeding would exceed 18,000 cubic feet per year for each consumer and in assuming that the average bill
114 to a consumer for gas consumed would be about $2.00 per month, and in assuming a total consumption of 6,405,000 cubic feet if all residents in said territory should consume gas, and in assuming that three-fourths of the residents in said territory would become consumers and that their average consumption would amount to 25,000 cubic feet per annum.

4. In assuming that the net return upon the investment required by an extension to the terri-

tory involved in this proceeding would be 4 per cent. per annum.

5. In requiring the proposed extension to be made when upon the figures assumed by the Commission the net return from an extension to the entire territory involved in this proceeding would be but 4 per cent. per annum.

6. In not finding that the total cost of the extension to the territory involved in this proceeding is as much as $86,731.69 and in assuming that probably $70,000 or $75,000 would be ample for such extension, and in further assuming that if certain houses which are rather isolated be omitted, the total cost of such extension would probably be about $65,000. 116

7. In assuming to eliminate from the cost of the extension required by said order the cost of mains from Flushing to Bayside necessary to supply such extension.

8. In assuming that the entire cost of the extension required by said order is not properly chargeable against the plan which the complainants asked your petitioner to accept, and in further assuming that the backbone of the present system of your petitioner is inadequate and that additional mains will need to be laid or the old mains rebuilt in order to take care of the increased consumption which will come in the district west of Alley Creek. 117

9. In assuming to make said order without having found any facts to justify the same.

10. In assuming to order your petitioner to make an extension so as to serve Douglaston, including Douglas Manor, whereas all evidence in

this proceeding relates to the cost of an extension to the entire territory involved in this proceeding, of which Douglaston and Douglas Manor form only a part, there being no evidence in this proceeding of the separate cost of the extension required by said order, and it being impossible for the Commission upon the evidence before it to determine that a reasonable return from the extension required by said order could be derived or was probable either at the present time or in the future.

11. In basing its opinion upon statements made and evidence given in another proceeding before
119 the Commission (*Purchase of Stock by Consolidated Gas Co., 4 P. S. C. Rep.*, [1st Dist., N. Y.] 231).

12. In assuming that your petitioner has selected the most profitable parts of the Third Ward of the Borough of Queens for its operations and has left the less profitable areas to look out for themselves.

13. In ordering extensions to be made by your petitioner through streets not shown to be public streets.

14. In ordering extensions to be made by your petitioner through streets which are private streets.

15. In ordering your petitioner to make extensions through streets, the location of and map for
120 which have not been finally adopted by the Board of Estimate and Apportionment of the City of New York.

16. In ordering your petitioner to file with the Commission a general plan or lay-out showing a proposed transmission and distribution system to be installed pursuant to the terms of said order.

IV.—In support of the contentions above set forth, your petitioner further alleges:

1. That the communities in the territory involved in this proceeding have developed almost wholly since the original location of your petitioner's plant at Flushing and that such communities are remote from such plant and are separated from the nearest mains of your petitioner by Alley Creek and by low land rendering these communities remote from other territory supplied by your petitioner and difficult and expensive to serve.

2. That your petitioner has a low-pressure system of mains extending as far as Bayside on the west side of Alley Creek, which system is adequate for the present needs of the territory now served 122
by your petitioner and for the normal growth of said territory for a long time to come. That because of its distance from the works of your petitioner at Flushing, it is necessary to serve the territory involved in this proceeding by a high-pressure system and that it is impracticable to extend the low-pressure system of the Company so as to supply the territory involved in this proceeding. That in order to install such high-pressure system it will be necessary to build a system of high-pressure mains all the way from Flushing to the easterly side of Alley Creek and that the entire cost of the installation which will be necessary to supply the territory is therefore chargeable against such extension and the probable return therefrom 123
should be reckoned upon such total cost. That if the present low-pressure system of your petitioner should be extended so as to supply the territory involved in this proceeding, the cost of gas supplied thereby would greatly exceed the amount which legally could be charged therefor. Further, that if such low-pressure system should be so extended the mains in such extension would have to be of a greater size than for a high-pressure sys-

tem, and that the increased cost of the larger mains for such extension would exceed the cost of building high-pressure mains from your petitioner's works at Flushing to such extension.

3. That the fair and reasonable cost of the extension to the territory involved in this proceeding as estimated by your petitioner will be at least the sum of $87,323.19 if all residents of said territory are served, $86,161.59 for 85% of such residents, and $84,225.59 for 60% thereof. That the Commission have assumed without sufficient evidence that the probable cost of such extension will
125 be from $70,000 to $75,000, or $65,000 if certain isolated houses are omitted.

4. That the territory involved in this proceeding is already supplied with electric light and that except to a very limited extent gas will not be used therein for lighting but for fuel purposes only. That in the experience of your petitioner in similar communities in other parts of the Third Ward of the Borough of Queens the majority of consumers use gas for cooking and water heating for only about five months of the year and only 6% of your petitioner's total of 8,500 consumers use gas exclusively for cooking.

That according to the experience of your petitioner in such similar communities, not more than
126 60% of the residents of the territory involved in this proceeding will use gas for any purpose for a long time to come and that ultimately and by diligent canvass not more than 85% of such residents can be induced so to do.

That according to the experience of your petitioner in such similar communities, the average annual consumption by each consumer who will so use gas in the territory involved in this proceeding

will not exceed 20,000 cubic feet in Douglaston and Douglas Manor and Douglaston Park and 15,000 cubic feet in the remainder of such territory.

That the Commission have assumed an average annual consumption of 25,000 cubic feet per consumer which your petitioner alleges is unduly high.

5. That by law your petitioner is limited to a charge of $1.00 per 1,000 cubic feet of gas, and that for the year ending December 31, 1913, the cost of gas to your petitioner, including operating expenses, taxes, etc., but excluding interest and any return upon capital invested, was 72.7 cents per thousand cubic feet of gas, leaving a net return 128
of 27.3 cents. For the year ending December 31, 1914, such cost and net return were 77.2 cents and 22.8 cents respectively.

6. That upon the basis of your petitioner's estimates of cost of the extension involved in this proceeding and of the probable return therefrom, the following is a statement of the gross receipts and net earnings to be derived from such extension and of the percentage of return upon the cost thereof, all based on the cost of gas for the year 1913:

Consumption	Cost	Gross Receipts	Net Earnings	Percentage of return on cost
(1) Maximum	$87,323.19	$6,405.00	$1,750.00	.02
(2) 85%	86,161.59	5,444.25	1,487.50	.017
(3) 60%	84,225.59	3,843.00	1,050.00	.012

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That upon the basis of the Commission's estimate of $70,000 as the cost of the extension, and upon the Commission's estimated consumption of 25,000 cubic feet per consumer per year for 75% of the total number of residents in the territory, the gross receipts by your petitioner according to

130 *Exhibit 3—Petition*

the cost of gas in 1913 would be $6,600, and the net earnings $1,801.80.

That these figures produce a return of 2.67% upon the investment.

That the foregoing estimates do not include any return to your petitioner upon the proportionate part of its capital invested in its plant and gas works required for the serving of such extension.

7. That this proceeding related to and involved a proposed extension of your petitioner's gas distributing system to the entire territory comprising the communities known as Douglaston, Douglas Manor, Douglaston Park and Little Neck, including Little Neck Hills, and not to any separate parts or portions of such territory. That all evidence as to the cost of construction submitted in this proceeding both by your petitioner and by the Commission and the other parties appearing upon the hearing related to a proposed extension to the entire territory above specified, and that the estimates of cost as well as of the probable return contained in the opinion of the Commission in this proceeding likewise relate to an extension to such entire territory. That the aforesaid order of the Commission, however, requires an extension for the serving only of "Douglaston including Douglas Manor."

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132 That the extension so ordered will cost proportionately more than an extension to the entire territory involved in this proceeding and the rate of return from the extension so ordered will be even lower than that which might be derived from an extension to such entire territory.

8. That the growth of the area will not be such as to produce a fair rate of return within the near future and that there is no prospect of a remun-

erative service from the proposed extension within a reasonable time.

9. That according to the evidence adduced upon the hearing in this proceeding, many of the streets through which your petitioner would be obliged to extend its mains are private streets and have not been shown to be public streets and that the location of and map for many of said streets have been only tentatively adopted by the Board of Estimate and Apportionment of the City of New York.

10. That the preparation of a general plan or lay-out required by said order to be filed with the 134
Commission will involve your petitioner in considerable expense to which your petitioner claims it should not be subjected in view of the other objections to the order heretofore urged.

V. By reason of the foregoing errors, said order of March 19, 1915, if put in force, will deprive this petitioner of its property without due process of law and deny to it the equal protection of the laws.

WHEREFORE, your petitioner respectfully asks that these proceedings be opened and set down for rehearing upon all the matters above enumerated, and that until the hearing and determination of 135
this petition and of any rehearing or reargument ordered, and until the entry of an order thereon, the order of this Commission therein bearing date March 19, 1915, be suspended, and that the time for your petitioner to notify the Commission as to whether it will or will not comply with said order be extended until ten days after the granting or denial of this petition and the entry of an order thereon, and that your petitioner have such other

and further relief as may be just and proper in the premises.

Dated, April 10, 1915.

Respectfully submitted,

NEW YORK AND QUEENS GAS COMPANY,
By M. H. SPEAR,
Secretary and General Manager.
KRAUTHOFF, HARMON & MATHEWSON,
Attorneys for Petitioner,
No. 55 Wall Street,
137 Borough of Manhattan,
City of New York.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MAYNARD H. SPEAR, being duly sworn, deposes and says, that he is an officer, to wit, the Secretary and General Manager of New York and Queens Gas Company, the above-named petitioner; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

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MAYNARD H. SPEAR.

Sworn to before me this }
10th day of April, 1915. }

THOMAS H. LEE,
Notary Public.
New York Certificate No. 51.
New York Register No. 7027.

Exhibit No. 4. 139

Order of Public Service Commission Denying Application for Rehearing.

At a stated meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 27th day of April, 1915.

Present:

EDWARD E. MCCALL, *Chairman,*
J. SERGEANT CRAM,
GEORGE V. S. WILLIAMS, 140
ROBERT C. WOOD,
WILLIAM HAYWARD,
Commissioners.

In the Matter

of the

Hearing on the motion of the Commission on the question of the extension of the gas mains of the NEW YORK AND QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.

Case No. 1856. Order Denying Application for Rehearing.

141

An order having been made in the above-entitled proceeding on March 19, 1915, directing New York and Queens Gas Company to make certain extensions of its gas mains and services, and New York

142 *Return to Writ*

and Queens Gas Company having applied to the Commission by petition dated and verified April 10, 1915, for a rehearing in respect to such order, and the Commission being of opinion that sufficient reason therefor has not been made to appear,

NOW, THEREFORE, IT IS

ORDERED, that the said application for a rehearing be and the same hereby is denied.

BY THE COMMISSION,
TRAVIS H. WHITNEY,
Secretary.

[L. S.]

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Return to Writ.

SUPREME COURT,

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Relator,

against

144 EDWARD E. McCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD and WILLIAM HAYWARD, Commissioners, constituting the Public Service Commission of the State of New York for the First District,
Respondents.

County Clerk's No. 12005—1915. RETURN TO WRIT OF CERTIORARI.

The respondents, Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C.

Wood and William Hayward, constituting the Public Service Commission of the State of New York for the First District, hereby respectfully certify and return to the writ of certiorari issued herein on the 30th day of April, 1915, a copy of which is hereto annexed, as follows:

FIRST. That on July 23, 1914, the Commission on its own motion adopted a resolution for hearing in Case No. 1856 entitled "In the Matter of the hearing on the motion of the Commission on the question of the extension of the gas mains of New York and Queens Gas Company to such extent as may be necessary to serve residents of Douglaston 146 and Little Neck in the Borough of Queens, City of New York," a copy of which said resolution is hereto attached and marked Schedule A. The relator herein, New York and Queens Gas Company, was duly served with a copy of said resolution. Thereafter on July 29, 1914, and subsequent dates a hearing was held in said Case No. 1856, Commissioner Maltbie and Commissioner Wood presiding, at which the relator appeared and was represented by counsel. Representatives of civic organizations and property owners also appeared and took part in the proceedings. Testimony and exhibits were introduced at the hearing and the parties thereto were afforded full opportunity to present such 147 facts and arguments as they desired prior to the Commission's determination, a record of which hearing and determination is contained in the schedules hereto annexed, made part hereof and marked Schedules B to F inclusive.

SECOND. That on November 10, 1914, Commissioner Maltbie submitted an opinion in said Case No. 1856 for the Commission's approval, but action thereon was deferred from time to time until

February 11, 1915, when the Commission approved said opinion by the votes of Commissioners Maltbie, Cram, Williams and Wood, the Chairman, Commissioner McCall, not voting. A copy of said opinion is hereto attached and marked Schedule C.

THIRD. That after a consideration of the testimony and exhibits introduced at said hearing and the matters arising in connection therewith the Commission on March 19, 1915, adopted a final order in said Case No. 1856, a copy of which is hereto attached and marked Schedule D.

Commissioners Maltbie, Cram, Williams and
149 Wood vote for and Commissioner McCall against the adoption of said order, a copy of which was duly served on the relator. In voting statements were made by the Commissioners as follows:

> "Chairman McCall: Record me in the negative on the ground that it is an unreasonable Order in that the expenses cannot possibly be met within a reasonable time and the company would not receive a reasonable return upon the cost of the extension.
>
> Commissioner Williams: Record me in the affirmative for the reason that, when the stock of the company was acquired by the Consolidated Gas Company of New York,
> 150 one of the arguments used on behalf of the applicant was that just such extensions as this could be made if the company were controlled by the larger company, on account of the larger company being better able to finance, and that it was also stated in that hearing that many mains would have to be built which would not pay a return for some time. This, I believe, is one of them.
>
> Commissioner Cram: I would like to be recorded as voting 'Aye' for substantially

the same reason, because they said that, if consolidation were allowed, it would be in the public interest because they would have more capital and more money and would provide better gas whether it was profitable or not when the people wanted it, with a view to building up the neighborhood. Consequently, I think the Order directing the mains to be built shall be approved.

Commissioner Wood: I agree with Commissioners Cram and Williams in the opinions they have expressed and believe those people should have gas, and this is the only means of getting it." 152

FOURTH. That by petition dated and verified April 10, 1915, said relator made application for a rehearing with respect to the matters determined by said final order and after hearing the attorney for the relator in support of said application on April 23, 1915, the Commission on April 27, 1915, unanimously adopted an order denying the application for a rehearing. Copies of which said application and order are hereto attached and marked Schedules E and F, respectively.

FIFTH. Respondents deny the allegation in the paragraph designated "VI" of the petition for the writ of certiorari herein, that Chairman McCall 153 voted against the adoption of the opinion, filed by the Commission.

SIXTH. Respondents deny upon information and belief the allegations in the paragraph designated "VIII" of said petition as follows:

"That said order of March 19, 1915, now remains in full force and effect to the harm, prejudice and detriment of your petitioner,

in that your petitioner upon competent evidence submitted by it in said proceeding was lawfully entitled to have said Commission refuse to require the extension by said order directed to be made and to have said Commission refuse to order any extension whatsoever to the territory involved in said proceeding, and that said order of March 19, 1915, was and is erroneous and unlawful and thereby your petitioner was and is harmed, injured, prejudiced and aggrieved."

SEVENTH. Respondents deny upon information
155 and belief each and every allegation in the paragraphs of said petition designated "IX," "X" and "XI."

EIGHTH. The following are the schedules annexed to this return and made a part hereof:

Schedule A. Copy of resolution for hearing adopted July 23, 1914.

Schedule B. Copy of testimony and exhibits on said hearing.

Schedule C. Copy of opinion of Commissioner Maltbie, approved February 11, 1915.

Schedule D. Copy of final order adopted March
156 19, 1915.

Schedule E. Copy of application of relator for rehearing, dated and verified April 10, 1915.

Schedule F. Copy of order denying application for rehearing, adopted April 27, 1915.

NINTH. By the consent of the parties hereto in order to lessen the record on the return to the writ of certiorari herein, some exhibits have been omitted.

TENTH. The foregoing statements and papers therein referred to and hereto attached contain, except as stated in and by paragraph Ninth of this return, all and singular the records and proceedings of the respondents had herein and the decisions, orders and all determinations thereon or therein, together with all the evidence submitted as demanded in this proceeding and directed by statute.

Dated, October 13, 1915.

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT, 158

by EDWARD E. McCALL,
Chairman.

J. S. CRAM,
GEORGE V. S. WILLIAMS,
ROBERT C. WOOD,
WM. HAYWARD.

Attest

TRAVIS H. WHITNEY,
Secretary.

(Seal)

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160 **Schedule A.**

Resolution for Hearing.

At a Stated Meeting of the Public Service Commission for the First District, duly held at its office, No. 154 Nassau Street, in the Borough of Manhattan, City and State of New York, on the 23rd day of July, 1914.

Present:

MILO R. MALTBIE, *Acting Chairman*,
J. SERGEANT CRAM,
161 GEORGE V. S. WILLIAMS,
ROBERT C. WOOD,
Commissioners.

In the Matter
of the
Hearing on motion of the Commission on the question of the extension of the gas mains of NEW YORK AND QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck, in the Borough of Queens, City of New York.
162

Case No. 1856. Resolution for Hearing.

RESOLVED, that a hearing be held on the 29th day of July, 1914, in the hearing room of the Commission, No. 154 Nassau Street, Borough of Manhattan, City of New York, at 3 o'clock in the afternoon, for the purpose of inquiring and determin-

ing whether an order should be made directing New York and Queens Gas Company to extend its gas mains, services and other apparatus to such extent as may be necessary to furnish gas to the residents of Douglaston and Little Neck, in the Borough of Queens, City of New York.

FURTHER RESOLVED, that notice of said hearing of not less than two days be given the New York and Queens Gas Company by service upon it of a certified copy of this resolution.

BY THE COMMISSION,
TRAVIS H. WHITNEY, 164
[L. S.] Secretary.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

I, TRAVIS H. WHITNEY, Secretary of the Public Service Commission for the First District, do hereby certify, that I have compared the above with the original adopted by said Commission, on July 23, 1914, and that it is a correct transcript therefrom and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the seal of the Commission, this 24th day of July, 1914. 165

TRAVIS H. WHITNEY,
(Seal) Secretary.

166 **Schedule B.**

Hearing Order in Case No. 1856.
Testimony.

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

IN THE MATTER of the Hearing on the motion of the Commission on the question 167 of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck, in the Borough of Queens, City of New York.	Hearing Order in Case No. 1856.

New York City, July 29, 1914.

Met pursuant to notice, at 3:10 p. m.

Before:

MILO R. MALTBIE, *Commissioner.*

168 Appearances:

ARTHUR DUBOIS, Esq., Assistant Counsel for the Public Service Commission for the First District.

JAMES S. BROWNSON, Esq., Chairman of the Douglaston Civic Association.

JOSEPH W. DOLITTLE, Esq., appearing for the Douglaston Realty Company.

F. H. REEVE, Esq., representing Mr. Joseph P. Day, Agents for Dwight-Murray Realty Company.

JOHN M. RIEHLE, Esq., representing the Long Island Sound Realty Company.

JOHN A. HARDIMAN, Esq., representing the Douglas Manor Association.

MESSRS. KRAUTHOFF, HARMON & MATHEWSON, Attorneys for the New York & Queens Gas Company, by

THOMAS ROBINSON, Esq., of Counsel.

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Mr. Robinson: I appear on behalf of the New York & Queens Gas Company, and if possible, I should like to adjourn this hearing to some later date. Mr. Spear, the General Manager of the Company, is away on his vacation, and the notice of this hearing was mailed on July 24th, and in his absence it was forwarded to him in the Berkshires, and he didn't get it until the 28th of July. We would, therefore, like a two weeks' adjournment.

Commissioner Maltbie: Why couldn't some one else represent the company?

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Mr. Robinson: He is the only one who is familiar with the matter at all, as I understand it.

Mr. DuBois: We might hear the complaint, Mr. Commissioner, of the citizens, and leave it to the company to put in their evidence at an adjourned session and recall for cross-examination such witnesses as they wish to cross-examine.

Commissioner Maltbie: I think we had better hear from the complainants; there are a great many of them here today, and it is quite a trip from Douglaston to this office, in the summer time particularly. I think we will hear from them today, at least. You may be persuaded from what they say to end the case by making the extension. I think we had better hear from them.

Mr. DuBois: Mr. Brownson, will you take the stand?

---

173 JAMES S. BROWNSON was called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. Mr. Brownson, where do you reside? A. Douglaston, Long Island, Douglas Manor.

Q. How long have you lived there? A. I have lived there for five years.

Q. You are the President of the Douglaston Civic Association? A. I am.

Q. That is made up of residents and land owners in Douglaston? A. Yes, sir.

Q. And the purpose of this hearing, Mr. Brownson, is to investigate as to the needs of the residents
174 in that vicinity for gas. Now, are you able to state briefly how near to your residence gas is at the present supplied by the New York & Queens Company? A. I should say approximately a mile and a half.

Q. And the nearest gas that that company supplies is on Broadway, on the west side of a creek that is known as Alley Creek? A. Yes, sir.

Q. And that is in Bayside, the extreme east part of Bayside? A. Yes, sir.

Q. And on the other side of you the nearest gas supplied is by what company? A. By the Nassau Gas Company, coming down almost to the city line.

Q. Douglaston and Douglas Manor are the extreme eastern limits of the City of New York bounded by the city line on the east and by Little Neck Bay and Alley Creek on the west? A. Yes, sir.

Q. Now, the community that is known as Douglas Manor is situated with reference to Douglaston in what position? A. It is the extreme northern part of Douglaston, north of the railroad track.

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Q. It is that part of Douglaston that lies out in the bay? A. Yes, sir, it is a peninsula.

Q. And Douglaston lies between Douglas Manor and the Long Island Railroad tracks, and crosses a little to the south of the tracks? A. Yes, sir.

Q. Now, where is Little Neck, with relation to Douglaston and Douglas Manor? A. Little Neck is east of Douglaston; Broadway almost intersects it, almost cuts it in half.

Q. Is there another community known as Douglaston Park? A. Yes, sir.

Q. That is really a part also of Douglaston, is it not? A. Yes, sir.

Q. And that lies where with reference to Little Neck? A. That lies south of Broadway, bounded 177 by Main Avenue over to a creek running north, probably, I should say, not over 2,000 feet from Main Avenue, east of Main Avenue.

Q. You are the president of the association that has been attempting to obtain gas service for this community that we have just described? A. I am, yes, sir.

Q. And you have had conferences with the officers of the New York & Queens Gas Company, with

the view to obtaining from them gas for the residents of these communities? A. I have.

Q. And you have been unsuccessful in persuading them to extend their mains and service to furnish these communities? A. Yes, sir.

Q. Can you state briefly the objection that they raised to furnishing the service? Was it a question of expense? A. They claimed that the return on the money was insufficient to warrant the outlay of capital.

Q. Now, the mains, if extended from the present terminus, in Bayside, to Douglaston, would have to cross a certain creek known as Alley Creek? A.
179 That is right.

Q. Alley Creek runs from Little Neck Bay for a distance of perhaps three-quarters of a mile to a mile south? A. Yes, sir.

Q. And throughout that distance it is used by boats of considerable size, is it not? A. Yes, sir.

Q. And the Long Island Railroad Company crosses Alley Creek by wooden drawbridge? A. Yes, sir.

Q. And Broadway, which is one of the main streets, as I understand, in that vicinity, also crosses on a wooden drawbridge? A. Yes, sir.

Q. So that it would be impracticable to lay mains over either of these bridges? A. That is right.

180 Q. In your conversation with the gas company it was stated, was it not, that it would be necessary in carrying mains to serve Douglaston to carry them under this creek? A. Yes, sir.

Q. And that that was the most serious item of expense in the extension? A. Yes, sir.

Q. And that was given as one reason why the company was unwilling to furnish the service? A. Well, that was hardly one of the reasons; it was probably included, although it was not stated specifically.

Q. Now, Mr. Brownson, are you able to state how many members there are of the Douglaston Civic Association? A. The last roll was 114.

Q. Have you had blueprints prepared showing the locations of the streets in Douglas Manor, Douglaston and Little Neck, and showing the houses that are at present built and occupied on these different places? A. I have, yes, sir.

Q. I show you three large blueprint maps entitled, the first, "Douglas Manor," the second, "Douglaston," and the third, "Bayside, Douglaston and Little Neck," and ask wheher you have had shown on these maps the location of each house now 182 in existence and occupied in these localities? A. Yes, sir, corrected up to May 1st, 1914.

Q. And you have given to each of these houses a number and have prepared a list showing by whom the house is owned or occupied? A. I have done that in Douglaston only; I was unable to do it in Little Neck.

Q. You also prepared for Douglaston a list showing residents of the various houses, the approximate cost of each house, and have checked with a mark the name of each man who occupies his house for only part of a year? A. Yes, sir.

Q. Is it true, Mr. Brownson, that in Douglas Manor, where you reside, that at least 90 per cent of the residents in the houses shown in this map 183 remain there through the entire year, winter as well as summer? A. Yes, sir; I should say the percentage was higher than that.

Q. You have marked on the list that you have prepared, the names of those who are not in their houses during the winter months? A. Yes, sir.

Q. And all the others remain there throughout the twelve months? A. Yes, sir, throughout the year.

184 *Schedule B—J. S. Brownson—Direct*

Mr. DuBois: I now offer in evidence the three blueprint sheets that are referred to. I will first ask Mr. Brownson a question:

Q. Do these maps accurately show the layout of the streets and the location of the houses thereon in Douglas Manor, Douglaston, Little Neck and Bayside? A. Excepting Bayside, yes, sir, as far as I know, they do, to the best of my knowledge and belief.

Q. You are certain of Douglas Manor, where you reside? A. Yes, sir.

185 Mr. DuBois: I offer in evidence as one exhibit these three blueprint sheets.

Commissioner Maltbie: They will be received and marked. Will you see that copies are furnished to the company?

The Witness: They have already been furnished to the company.

Q. I will ask you, Mr. Brownson, if you have furnished to the New York & Queens Gas Company, copies of these maps which have been received in evidence? A. Yes, sir, I have, exact copies.

(The blueprints referred to were received in evidence, and thereupon marked Exhibit No. 1 of this date.)

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Q. I now show you, Mr. Brownson, a list consisting of five sheets of typewritten names; opposite each name is a certain figure in dollars, and I ask you if this list of names, each name being numbered, represents the residents of the houses shown in the maps of Douglas Manor and your approximation of the value of the house in which he resides? A. Yes, sir, that includes Douglas Manor, Douglaston and Douglaston Park.

Q. Can you state briefly the total estimated valuation of these houses contained in this list and as shown in the maps? A. The approximate value is $1,790,500.

Mr. DuBois: I offer in evidence as one exhibit these five sheets of typewritten names and the value of the residences.

Commissioner Maltbie: That will be received in evidence and marked.

(The five sheets referred to were received in evidence and thereupon marked Exhibit No. 2 of this date.)

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Q. I will ask you, Mr. Brownson, if you will furnish to the company a copy of this typewritten list? A. Yes, sir, I will.

Q. On this list which has been received in evidence as Exhibit No. 2, there are 230 names. Each of those names, as I understand it, represents one of the residences shown on the map? A. Yes, sir.

Q. And you have placed in the left-hand margin opposite a certain number of names, a pencil check; that indicates that the man whose name is opposite that number resides in his house for less than the whole year around? A. Yes, sir.

Q. And all the other members reside in their houses throughout the entire year? A. Yes, sir.

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Q. There are only six names checked here as being part-of-the-year residents, is that correct? A. That is correct, sir.

By Commissioner Maltbie:

Q. Out of the 230 there are only six that are part-of-the-year residents? A. Yes; I would like to say, Mr. Commissioner, that that 230 represents all the houses; there are about five there that would

not use gas, like the church and the parish hall and the fire house, but the approximate number is 225 buildings.

Q. There are 225 buildings—— A. At least 225 that would use gas.

Q. Two hundred and twenty-five that would use gas the whole year around? A. Yes, sir.

By Mr. DuBois:

Q. Now, Mr. Brownson, there is electric light, I take it, in Douglaston, Douglas Manor and Little Neck? A. Yes, sir.

191 Q. And Douglaston Park, also? A. Yes.

Q. So that the principal demand there is for gas for the purpose of cooking? A. Yes, sir.

Q. Now, will you state to the Commissioner the reason for your bringing forward this matter, and how it has come to your attention that there is a considerable demand for the use of gas in these vicinities? A. Yes, sir, I have been working on this proposition for the last three years for the Douglaston Civic Association. The demand has been very great, especially in the summer time. People have a great deal of trouble keeping their help, and most people who come out there to live and build are those that have been in the habit of living in apartments in New York, where they are accustomed to

192 gas ranges, and they do not want to use coal. There are a great many instances where people absolutely refuse to buy property there because we did not have any gas; it is really the only thing that we need in Douglaston at the present time to make us absolutely happy.

Commissioner Maltbie: You are fortunate. (Laughter.)

Q. You have known instances yourself, of people who have refused to take houses or to buy property there because of the lack of gas? A. Merely through the statements of others, that is all, as to that part.

By Commissioner Maltbie:

Q. Are you going to show to what extent the houses are piped for gas, or would be piped for gas and would use gas if the mains were there? A. Why, I have some petitions there—they are not absolutely complete—but every one would use gas for cooking and a few would use it for lighting, not many. We have just been figuring on using it for 194 cooking.

Q. Have you anything definite in the way of signed statements by the owners of the houses out there that they would pipe a house for gas if they are not piped? A. Why, if you will just hand me those petitions, Mr. DuBois. (Petitions handed to witness.) I prepared, some time ago, these petitions: "The undersigned residents and property owners of Douglaston and Little Neck, Long Island, are anxious to have gas mains put through the streets of these particular sections of the Borough of Queens, and they agree to consume gas in their houses provided connections are made free of charge to them."

Q. What do you mean, "Connections are made 195 free of charge"? A. With the house.

Q. You do not expect the company to pipe the house—— A. Oh, no, just to bring the pipe to the house, and the residents agree to do the rest.

Q. Suppose they bring it to your property line? A. Well, I do not think there would be any trouble with that; I had understood that the law required them to bring it to the house.

Q. No, it does not. A. Then I was misinformed.

Q. You see the house might sit back from the property line quite a bit? A. Yes, sir.

Q. If a man had ten acres around his house. A. They do not have down there, Mr. Commissioner. Most of the houses are not farther than 25 feet back of the street.

Mr. DuBois: I have no further questions of Mr. Brownson.

Commissioner Maltbie: Has the company any questions?

197 Mr. Robinson: Mr. Commissioner, I have telephoned to Mr. Mathewson, and he asked that he be allowed to cross-examine these witnesses at an adjourned hearing.

Commissioner Maltbie: Mr. Charles F. Mathewson?

Mr. Robinson: Yes.

Commissioner Maltbie: Why can't he be here this afternoon?

Mr. Robinson: I believe he had been here and he thought this adjournment would take place.

Commissioner Maltbie: He was here this morning in another case.

Mr. Robinson: Yes, it was adjourned, too.

198 Commissioner Maltbie: Oh, no; we took evidence in both of those cases he appeared in.

Mr. Robinson: Yes, sir, that he appeared in, yes. Can that be done? Can he cross examine these witnesses later?

Commissioner Maltbie: Why, yes, they can come back.

Schedule B—J. W. Dolittle—Direct. 199

JOSEPH W. DOLITTLE was called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. What is your business, Mr. Dolittle? A. Real estate development.

Q. And you are connected with what company? A. Douglaston Realty Company.

Q. And that company is in the business of selling real estate and building houses for rent and for sale? A. Yes, sir.

Q. In what particular section of Douglaston do you operate? A. Douglaston Park; we bought the park when it was the Corey farm and put the 200
streets in and all the improvements that have been put in.

Q. How long have you been operating in Douglaston Park? A. Since 1909;; we bought the property in 1907, but began developing it in 1909.

Q. At the time you bought the property were there any houses on it at all? A. There were two houses on it.

Q. At the present time how many houses are on the property that you originally purchased? A. 25.

Q. Are you building or selling lots to people who are building more at the present time? A. We are not building any at the present time, but we are 201
selling lots to people who will build and make that their home. We shall build some more houses this fall for the spring market.

Q. How much land do you still own in that vicinity? A. We own 1,000 city lots.

Q. And you have sold how many already? A. About 350.

Q. Your property lies where, with relation to the Long Island Railroad Company tracks—on the

south side? A. It lies on the south side of Broadway, extending from the Meadows, between Bayside and Douglaston and Little Neck.

Q. And you are joining in this movement to obtain gas service from the New York & Queens Gas Company? A. Yes.

Q. You want it for the houses that you build yourself? A. Yes.

Q. And have you had any intimation that the people to whom you have sold, or to whom you have tried to sell, require gas for their ranges in cooking? A. I have.

203 Q. And that seems to be one of the universal complaints, that there is a lack of gas there? A. Yes, sir.

Q. Have you any knowledge as to the number of people who have bought property from you who would use gas if it were laid on the streets on which they front? A. Every property owner or every house owner in the park would pipe their houses for gas and use it for cooking.

Q. You have electric light in your houses also, have you? A. Yes.

Q. There would probably be no great consumption for illumination? A. Probably not.

Q. Now, the people who have bought your houses, do they live there the entire year around? A. They

204 do.

Q. All of them? A. Doctor Schofield goes to New Hampshire for about two months in the summer time.

Q. But the community is a community that lives there the year around? A. It is, yes, sir.

Q. Winter as well as summer? A. Yes.

Q. And that is true to your knowledge also of Douglaston and Douglas Manor? A. It is.

Q. And Little Neck, also? A. Yes, sir.

Q. That is, it is not a summer community? A. No.

Q. It is a year-around community? A. Yes, sir.

Q. Now, about what would you say was the average cost of the houses that you have erected in Douglaston Park? A. The cost of the houses themselves, without the land, you mean?

Q. Without the land. A. $7,500.

Q. And the minimum cost of any houses that you have erected is about what? A. $5,000.

Q. Now, in Douglas Manor, is the minimum about the same? A. It is higher.

Q. And the average cost of houses there you would say is higher also? A. I should, considerably. 206

Q. Now, in Douglas Manor and Douglaston, are there vacant lost on which houses could still be built? A. A great many.

Q. That is, the community is susceptible of considerable growth? A. It is, in fact, it has doubled in the last six years. The number of houses in Douglaston has doubled in the last six years, I think.

Q. You say there is room for as many more houses as are already constructed there? A. Yes, there is room for five times as many.

Mr. DuBois: I think I have no further questions. 207

By Commissioner Maltbie:

Q. Are those houses that you have erected piped for gas? A. They are not, but we have provided to pipe to the kitchens for gas.

Q. Your idea being that they would use electricity for illumination largely and gas for heating and perhaps in the kitchen, perhaps for lighting in

the kitchen and maid's room, or something of that sort? A. That is right.

By Mr. DuBois:

Q. Have you had experience in dealing with real estate and especially houses costing from $5,000 up that have been piped for gas for cooking, and do you know anything about the usual consumption of gas by such a house? A. Well, I think that the average house would use about 2,500 to 3,000 feet a month.

Q. At a dollar a thousand that would be two-fifty
209 to three dollars per month? A. Yes, I think that is placing it low. If we had gas in Douglaston we would pipe all of our houses and put in gas ranges instead of coal ranges, because we find that the purchasers prefer the gas ranges and to heat their kitchens by steam.

Q. Heat the kitchens by steam, you say? A. Yes, steam radiator.

Q. That is from the steam furnace that furnishes the steam for the rest of the house? A. Yes.

By Commissioner Maltbie:

Q. Would they use gas for hot water heaters? A. Yes, sir, they have an arrangement now whereby you can get hot water instantly at very little cost.
210

Commissioner Maltbie: That is all. Do you have any questions, Mr. Robinson?

Mr. Robinson: No, sir.

JOHN M. RIEHLE was called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. Where do you reside? A. I reside in New York; I am the President of the Long Island Sound Realty Company that owns Marathon Park, at Little Neck, and we develop it.

Q. Where is your development in relation to Douglaston and Douglas Manor? A. Immediately south of it, and it is only divided by the railroad.

Q. And you have how great an area under development? A. About 800 lots.

212

Q. And your business is the improving of this property and selling it to people who build houses? A. Build houses, and we build some ourselves.

Q. How many houses have you built in this development? A. We have only started to build lately, about eight.

Q. About how many lots have you sold so far? A. About 15 per cent of them.

Q. And about what is the average cost of the houses that you have constructed? A. They run from $3,000 up.

Q. Up to what? A. Up to about $4,500, ours is a cheaper development, where people would require gas more than elsewhere.

213

Q. Your houses are wired for electricity? A. Yes, sir.

Q. But they are suitable for the use of gas and gas ranges? A. Yes, sir, a very easy proposition to run a pipe to the kitchen, and where there are fire places to run a pipe up, we have provided for that, to use it for gas logs also, which would make quite some consumption for the use of gas in the fall of the year.

Q. In your experience in dealing with possible purchasers, have you found that there was consid-

erable demand for gas ranges rather than coal ranges? A. In every instance. My own personal knowledge, I lost the sale of two houses because we had no gas, and every prospective purchaser, the first question he asks you is whether you have gas.

Q. In future houses that you would build in that development you would provide for gas ranges if gas were available? A. We would provide for gas ranges, for gas logs, and gas on the first floor.

Q. You would not make any provision for coal ranges at all? A. None whatever.

By Commissioner Maltbie:

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Q. You are willing to pipe from the property line into the house? A. We are, yes. In connection with that, the Nassau County, where we also develop a lot, they put in 50 feet from the property line into your property—they put in 50 feet free, the Nassau County—the gas company.

Q. What price per thousand do they charge? A. I could not tell you, I think it is $1.10.

By Mr. DuBois:

Q. Do the people that live in the houses that you have erected or sold, or the houses that have been built on land that you have sold, live there all the year around? A. All the year around.

216 Q. And you know the community in Douglaston and Douglas Manor and Little Neck? A. I do.

Q. That is an all-the-year-around community, is it? A. Absolutely.

Q. Is there any other statement you desire to make in this connection? A. Except there is a very large area that has not been stated in here, for instance, the balance of Little Neck, property and houses that join these properties, and also West Moreland, which has a great many houses in there,

and I know to my own knowledge that every one of them would consume gas. There are a great many houses in Little Neck.

Q. Those are shown on one of the blueprints? A. I have not seen it, I did not know whether it was or not.

Mr. DuBois: I have no further questions of Mr. Riehle.

Commissioner Maltbie: That is all.

F. H. REEVE was called as a witness, and, having been duly sworn, testified as follows: 218

Direct examination by Mr. DuBois:

Q. What is your business, Mr. Reeve? A. I represent Joseph P. Day, Agent for the Dwight-Murray Realty Company, owners of Little Neck Hills, Little Neck, L. I.

Q. And Little Neck Hills lies just where with relation to Douglaston, Douglas Manor and Douglaston Park? A. It adjoins those properties on the east, and it is on the south side of Broadway, reaching down Little Neck Road, south.

Q. What is your relation to this property; is Joseph P. Day & Sons the owner of this property? A. We are selling agents for the Dwight-Murray 219 Realty Company, owners of the property.

Q. And that property is of how great an area? A. It is 200 acres, 1,000 lots developed and 2,500 more lots to be developed.

Q. When you say the lots are developed, you mean streets are laid out and sidewalks and pavement put in? A. Yes, sir.

Q. And are some houses built on this property? A. There are.

Q. How many? A. There are four finished houses, there are ten in the course of construction, and four under contract for construction.

Q. And a number of your lots are sold, are they? A. Yes, sir.

Q. About how many? A. About 85.

Q. About 85? A. Yes, sir.

Q. And of the houses that you have built, what would you say was the average cost? A. From three—they scale from three thousand to nine thousand dollars.

Q. Those are single family houses? A. They are.

221 Q. And those that have been occupied are occupied by people who live there the year around? A. They are.

Q. And they are wired for electric light, I assume? A. Yes.

Q. And have you any knowledge as to whether the owners or purchasers of these houses would use gas for cooking if they had the opportunity? A. In every instance, as was stated.

Q. You have talked with prospective purchasers and purchasers? A. Yes, sir.

Q. Have you lost sales through the failure of the company to provide gas in this locality? A. We have lost two sales for that one purpose only, because they could not have gas.

222 Q. Do you know that the people who now use coal would change to gas if they had the opportunity? A. They so state.

Q. And that can be verified by a canvass made? A. Yes, sir.

Mr. DuBois: I have no further questions.

The Witness: I would like to say, Mr. Commissioner, this is again a question, this property means the building of 1,500 homes. There are 18 built and under the course of

construction that are contracted for, and today the buyer of the land is a home builder and we have arranged plans to see that the homes are built, and again we have a thousand lots with 500 for homes, and 2,500 more lots for additional homes. I might say, Mr. Commissioner, this map does not show the homes put up on Little Neck Hills. I would be glad to furnish a blueprint giving the homes already built there and a plot of the property.

By Mr. DuBois:

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Q. I think the Commissioner would like to have such a map, and have it keyed with reference to the name of the owner or occupant of the house and whether he is there the year around or not. A. I will be glad to do that, and have that made up.

Mr. Robinson: Will you furnish one to the company also?

The Witness: Yes, sir, I would be pleased to do so.

Mr. DuBois: I have no further witnesses at this time, Mr. Commissioner.

Commissioner Maltbie: Has the gas company anything?

Mr. Robinson: No, sir, I would like to 225 have the hearing adjourned for cross-examination at some future date which you may fix.

Commissioner Maltbie: Do you know what length of main would be required to serve these houses?

Mr. Robinson: I do not know a thing about it.

Commissioner Maltbie: What is the nearest point your mains come to this property?

Mr. Robinson: I do not know anything about it, Mr. Commissioner; I do not know whether they have mains there or not.

Commissioner Maltbie: Well, if you do this work, you ought to do it before winter, hadn't you?

Mr. Robinson: I should think so, that would be the time to do it.

Commissioner Maltbie: Now, if this matter goes over very long, you won't get it done before winter.

Mr. Robinson: Mr. Spear, I understand, will be back in two weeks. He is on his
227 vacation now. I think he could take it up as soon as he comes back, if you can have a hearing in the middle of August.

Mr. Riehle: Mr. Chairman, the Chairman of this Civic Association has been taking this up with this company for the last four years, and it seems unusual that they should not be here this afternoon and answer this complaint. We are here at a great deal of hardship to all of us; we are all business men, and were notified only yesterday to answer this thing. They know it is on, and they send a clerk down and say they won't be here; I think that is unusual.

228 Mr. Robinson: Mr. Spear, the General Manager of the company is on his vacation, up in the Berkshires, and we did not get the notice until just before noon.

Commissioner Maltbie: You know, the Consolidated Gas Company owns the stock of this company, and one of the arguments put forth with a great deal of force when they wanted to buy this stock was that they would furnish money to finance this com-

pany, that they would not have any trouble, and that the company, unless the stock was purchased by the Consolidated Gas Company, would have trouble financing extensions. Now, it seems to me rather queer that at the first complaint that is made to us regarding extensions over in your territory, the company does not want to provide the money to make the extensions. Now, if the public is to get any good out of the transfer of the ownership of stock to the Consolidated Gas Company, now is the time to make good.

Mr. Brownson: Some time ago, in fact, quite recently, on date of June 24th, Mr. Spear wrote me, after going over these maps, stating that it would be impossible for them to put the mains through unless the residents of Douglaston advanced them $10,000 to help defray expenses. The idea was that that $10,000 was to be returned on the amount of gas consumed, I think 25 per cent would be returned semi-annually to those who advanced the money. We thought at that time that we were not in position to advance a public service corporation any money to put their mains through. From conversations with Mr. Spear on several occasions he told me that the cost of piping Douglaston would be $25,000, of which $10,000 would have to be used to put the pipes under the creek. 230 231

Commissioner Maltbie: How much did he tell you?

Mr. Brownson: $25,000. We were discussing an average consumption per house of $3.00 a month for five months in the year, his own figures.

Commissioner Maltbie: Did he tell you how much mileage of main it would take?

Mr. Brownson: This letter here, if I may read it, will show.

Mr. Riehle: That was not the whole thing, however, just one of the sections mentioned.

Commissioner Maltbie: The expensive part is getting across, or under, the creek, isn't it?

Mr. Brownson: If I may read this letter of June 24th (reading): "In further reply to your favor of May 23d, and supplementing my telephone conversation with you, I beg
233 to say that I have taken all the houses shown on your map"—that is this recent map——

Commissioner Maltbie: Those three sections?

Mr. Brownson: Yes, sir. (Continuing reading):—"figured a high consumption for each and a low cost for the work, and it shows a return of approximately 2½ per cent on the investment. This, I think you will agree with me, is not the return we should have on a risk of this kind, and I am, therefore, obliged to advise you that we cannot make the extension excepting along the lines outlined in my letter to Mr. Do-
234 little on September 27th, 1913, a copy of which I sent you at that time. In case that letter has been mislaid I am enclosing another copy of it. I regret exceedingly that the figures do not show up more profitably, and trust that you will give our proposition careful consideration, and that we may be able to serve you along those lines."

This is the letter to Mr. Dolittle: (Reading):

"Agreeable to our talk of a few days ago, I beg to say that we have made a very careful survey of Douglaston, Douglaston Park and Douglas Manor, and figuring a very high consumption per meter nets us a return of less than three per cent, which is considerably short of even a fair return on the investment required. We will, however, make this extension, provided $10,000 is deposited with us, and on a canvass of the territory, enough appliances are ordered to insure us the gross income which we have figured on. Both conditions are equally important. The $10,- 236
000 we will return semi-annually in payments of 25 per cent of the gas bills paid on the extended lines. I trust that this proposition will be considered favorably by the people in this section, and that we may be favored with your contract."

Now, in the previous year, figuring 170 houses in Douglaston——

Commissioner Maltbie: I was asking you how much mileage of main would be necessary; I do not see it in that letter.

Mr. Brownson: I beg your pardon. It is right here. It requires 43,000 feet of main pipe alone for only 170 houses.

Commissioner Maltbie: 43,000 feet? 237

Mr. Brownson: 43,000 feet of main pipe alone for 170 houses. That is merely figuring Douglaston at 170, and we have on this list 225 and 186 in Little Neck.

Mr. DuBois: Mr. Brownson, those figures were based on a five months' consumption, or on a year's consumption?

Mr. Brownson: Five months' consumption, figuring $3.00 a month consumption for each house.

Mr. Riehle: That is, the company figures that?

Mr. Brownson: Yes.

Mr. DuBois: The testimony is that it is a twelve months' consumption.

Commissioner Maltbie: When will Mr. Spear be back?

Mr. Robinson: I understand in two weeks.

Commissioner Maltbie: Will he be back in time to have a hearing on the 13th?

Mr. Robinson: Yes.

Mr. W. H. Van Steenbergh: I want to be heard a little bit on this. While I am some-
239 what connected with the Consolidated Gas Company, I am also somewhat interested on both sides of this proposition. I am a stockholder of the Consolidated Gas Company, and yet I am not a party to a proposition of this kind. I know that the officers of the Consolidated Gas Company want to have a fair hearing in this matter, and I do not believe if the head officials were advised of the fact that on a hearing of this kind a postponement is asked for, when they have had due and timely notice of it extending over a long period of time, that they would be parties to this proposition, and I, for one, as
240 a resident and taxpayer in Douglas Manor, want to enter a vigorous protest against any postponement of this hearing. I say that the gas company have had abundant opportunity to prepare itself for this hearing today.

Mr. Robinson: The first notice of the hearing was mailed on the 24th of July.

Mr. Van Steenbergh: They have got somebody else besides Mr. Spear who can look after this proposition and appear before this

Commission and present their side of this case.

Mr. Robinson: It was reported to Mr. Spear and he was not here.

Commissioner Maltbie: I know, but it is not necessary that Mr. Spear be present. Hasn't the company somebody else who can take this up?

Mr. Robinson: He is the only one familiar with this matter, and Mr. Mathewson got here this morning, and he did not know a thing about this until I telephoned him. I telephoned your office yesterday afternoon and had a talk with some one and I told them that we would like an adjournment. 242

Commissioner Maltbie: The situation is, that you have to lay these mains before the frost gets in the ground.

Mr. Robinson: Two weeks' time will be enough.

Commissioner Maltbie: I know how these things go, and two weeks slips along, and then two weeks more and two weeks more, and then you can't get it done before winter and you want it put over until spring.

Mr. Robinson: No, I do not know anything about that. If you will set it down for the 13th, I am quite sure Mr. Spear will be back. 243

Mr. DuBois: The 13th, 14th and 15th are bad days for me in the afternoon.

Commissioner Maltbie: What is the day he will be back; when is he coming back?

Mr. Robinson: From the message he was to be back two weeks from today, that would be the 13th.

Commissioner Maltbie: You say you can't very well have it on the 13th, 14th and 15th, Mr. DuBois?

Mr. DuBois: That is the only time I really saw for a vacation. I can take it in the morning of any of those days.

Commissioner Maltbie: I think this hearing will have to stand adjourned until the 13th. I shall probably not be here myself, and perhaps before I leave that admonition may be repeated that when the Consolidated Gas wanted to purchase the stock and I voted against that proposition, one of the arguments that was made very strong with me was that the Consolidated Gas Company would furnish plenty of money to finance ex-
245 tensions, and the people over there could not get extensions unless the Consolidated Gas furnished them. That did not appeal to me very much because the company always had done without the Consolidated Gas, and I thought they would do it again, and now on the first case where it comes up, along the company comes and says, "No, we can't afford to produce the money," and that does not convince a man that there was very much in that argument.

Mr. Van Steenbergh: Commissioner, will you have it spread upon the record, that fact that when the 13th comes that no further
246 adjournment shall be asked for?

Commissioner Maltbie: I shall expect them to go right on; I shan't be here on the 13th.

Mr. Van Steenbergh: I should like to have it spread upon the minutes, so that they can't say afterwards that they did not know on the 29th of July that this was set down peremptorily on the 13th.

Commissioner Maltbie: Yes, they know.

Mr. Van Steenbergh: I should like to have it affirmatively appear on the record.

Commissioner Maltbie: There is no excuse for them not appearing on the 13th and proceeding with this case immediately.

Mr. Reeve: Mr. Commissioner, as you are appointed to decide this matter, won't you accept an invitation to come out and look over the situation?

Commissioner Maltbie: Oh, I have been through there; I know what you have got.

Mr. Reeve: We would be glad to furnish an automobile—I know you have one of your own—— 248

Commissioner Maltbie: I am afraid you might sell me some lots.

(Laughter.)

We will make it ten-thirty in the morning.

Mr. Robinson: Will the witnesses who are present here to-day be present on that day for cross examination?

Commissioner Maltbie: If you will notify Mr. DuBois, or Mr. Brownson, what men you want here on the 13th, I suppose they will come. This hearing then will stand adjourned to August 13th, 1914, at 10.30 A. M. 249

(Whereupon, at 4.00 P. M., the hearing in the above-entitled matter was adjourned to August 13th, 1914, at 10.30 A. M.)

250 **Hearing Order in Case No. 1856.**

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

IN THE MATTER

of the

Hearing on Motion of the Commission, on the question of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent as
251 may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.

Hearing Order in Case No. 1856.

New York City, August 13th, 1914.

Met pursuant to notice at 10.30 A. M.

Before:

ROBERT C. WOOD, *Commissioner.*

Appearances:

252 ARTHUR DUBOIS, Esq., Assistant Counsel for the Public Service Commission for the First District.

JAMES S. BROWNSON, Esq., Chairman of the Douglaston Civic Association.

JOSEPH W. DOLITTLE, Esq., representing the Douglaston Realty Company.

F. H. REEVE, Esq., representing Mr. Joseph P. Day, Agent for the Dwight Murray Realty Company.

JOHN M. RIEHLE, Esq., representing the Long Island Sound Realty Company.

Messrs. KRAUTHOFF, HARMON & MATHEWSON, representing the New York & Queens Gas Company, by

EDWARD J. PATTERSON, Esq., of Counsel.

H. M. SPEAR, Secretary & General Manager, for the New York & Queens Gas Company.

Mr. DuBois: Mr. Commissioner, this is 254
an adjourned session of the hearing as to the extension of gas mains to Douglaston and Little Neck, and counsel for the gas company asked that we have present for cross examination four witnesses who were examined on direct examination at the last session. They are here for cross examination if Mr. Patterson wants to ask them any questions.

Commissioner Wood: Are you ready to proceed, Mr. Patterson?

Mr. Patterson: I would like to ask a question of Mr. Brownson.

255

JAMES S. BROWNSON was recalled for further examination and having been previously sworn, testified as follows:

Commissioner Wood: Have you been previously sworn in this proceeding, Mr. Brownson?

The Witness: Yes, sir.

Cross examination by Mr. Patterson:

Q. What is your name? A. James S. Brownson.

Q. You live in Douglas Manor, Mr. Brownson? A. Yes, sir.

Q. And on what street? A. Bay Avenue.

Q. Will you indicate on the map which has been offered in evidence where your residence is? A. (Indicating on map.)

Mr. DuBois: Indicating the lower left-hand corner of the map of Douglas Manor.

257

Q. Just above the word "Number 24," just above the words "Bay Avenue?" A. Yes, sir.

By Commissioner Wood:

Q. Are these streets actually laid out, or is this a proposed map? A. They are actually laid out.

Q. Regulated and graded? A. Yes, sir; all the improvements, excepting, of course, sewers and gas.

By Mr. Patterson.

Q. Have these streets been dedicated to the city, Mr. Brownson? A. No, they have not, in Douglas Manor.

258

Commissioner Wood: They have to be dedicated before the city owns them, don't they?

Mr. Patterson: There has got to be a dedication and an acceptance by the city to make them public streets.

Commissioner Wood: If they are a street, there is a perpetual easement, though, when once they become streets.

Mr. Patterson: When once they become public streets, but they may be private streets.

Commissioner Wood: Are these public or private streets?

The Witness: These are theoretically private streets, but really public streets, as we have all the improvements including water and electric lights.

Commissioner Wood: They must be one or the other, not theoretically.

Mr. Patterson: I will introduce evidence in regard to that later, Mr. Commissioner, but I think Mr. Brownson is correct in his 260 statement that they are at the present private streets and have not been dedicated to the city. They may be used by the public.

Commissioner Wood: Has the map been actually adopted yet?

Mr. Riehle: Yes, sir.

The Witness: The map has been adopted as a tentative map, passed on by the Board of Estimate, I think, on the 23d of January, last; that is, it is not a final map yet, and the final map will not be completed for two years, but a copy of this map is on file in the County Clerk's office in Jamaica.

Commissioner Wood: They do not usually 261 change the maps after they once adopt them, do they?

The Witness: No, sir.

Q. The statements you are making now refer to Douglas Manor only? A. Douglas Manor only; yes, sir.

Q. In your previous testimony you were asked if you had anything in the way of signed state-

262 *Schedule B—J. W. Dolittle—Cross*

ments by the residents of Douglas Manor to the effect that they would use gas if it was installed, and in your answer you referred to the petition which certain residents of Douglas Manor had signed, a petition in this proceeding. A. Yes, sir.

Q. Do you know of any other paper signed by those residents in which they agree to use gas? A. None excepting those that were offered in evidence.

Mr. Patterson: I think that is all, Mr. Brownson. Will Mr. Dolittle take the stand?

263

JOSEPH W. DOLITTLE was recalled for further examination, and having been previously sworn, testified as follows:

Commissioner Wood: Have you been previously sworn?

The Witness: I have; yes.

Cross examination by Mr. Patterson:

Q. Mr. Dolittle, where do you reside? A. I reside at 47 Claremont Avenue, Borough of Manhattan.

Commissioner Wood: Where is that, I
264 can't hear you?

The Witness: 47 Claremont Avenue, Borough of Manhattan.

Q. And you operate, or your company operates in the section known as Douglaston Park? A. Yes, sir.

Commissioner Wood: What company is that?

The Witness: Douglaston Realty Company.

Q. Now, in your previous testimony you said every property owner, or every house owner in the park would pipe their houses for gas and use it for cooking? A. Yes, sir.

Q. Upon what do you base that statement, Mr. Dolittle? A. We had a gentleman call on every property owner at Douglaston Park and they all agreed to do that; our representative called on them.

Q. Who was that representative, Mr. Dolittle? A. Mr. Frisbie. 266

Q. And when was that canvass made? A. Why, it was some months ago, I can't state just the date. Mr. Frisbie is here and he can give you the date.

Q. Then your knowledge in regard to that is entirely derived from what Mr. Frisbie told you? A. Not entirely, no, sir; because the majority of the people residing at Douglaston Park have told me the same thing at different times, but in order to make sure of our ground, we took a canvass of the houses, the owners of the houses and occupants of the houses so that we would not come here and testify that a certain number of people would take gas and then not have them do it.

Q. Have you any signed agreement by those residents of Douglaston Park to the effect that they will use gas if installed? A. I have not. 267

Q. Do you know of any such signed agreement? A. Only the petition.

Q. Only the petition.

Commissioner Wood: You say "Pipe houses for gas," you mean put pipes through the houses?

The Witness: Yes, sir.

Q. Do you mean, when you say that the residents would pipe their houses, do you mean for illuminating purposes or for heating purposes? A. I do not think that many of them would use it for illuminating purposes entirely.

Q. The principal use would be for heating? A. Would be for heating purposes, yes; heating and cooking.

Q. Yes.

Mr. Patterson: I think it appears in the record already, Mr. Commissioner, that these communities are supplied with electricity
269 and that most of the houses are wired for electric lighting.

Commissioner Wood: Yes, sir.

Q. At the last hearing, Mr. Dolittle, Commissioner Maltbie asked you the question "Are those houses that you have erected piped for gas?" And your answer was, "They are not, but we have provided to pipe to the kitchen for gas." Will you explain a little more fully what you mean by that answer? A. In all the plans that were drawn there was a provision made for installing gas ranges and we arranged our plans so that we could put pipes to that place with very little expense to the owner of the property.

270 Q. But actually the houses are not piped? A. No; because there has been no reason for piping them. I will amend that a little to say that the houses which the Douglaston Realty Company has built in the park have not been piped for gas for illuminating purposes, but some other houses which have been built by private parties are piped throughout.

Q. Do you know where the title is to the streets in Douglaston Park? A. Broadway, or as it is

now called Jackson Avenue and Alley Road have been public streets for the past, more than a hundred years. The other streets have been laid out and I have seen the map which Mr. Brownson mentioned as having been adopted by the city.

Commissioner Wood: This map of Douglas Manor?

The Witness: Yes, sir; the map which has been adopted by the Board of Estimate and Apportionment, and all of our streets are laid out according to that map and the grades established according to the grades on that map. 272

Commissioner Wood: Are the final grades there now?

The Witness: The final grades are now there, yes, sir. The city has laid water mains through the streets and we have all the improvements except sewers and gas.

Q. You have sewers and electric lights? A. We have no sewers.

Q. I mean you have water and electric lights? A. We have water and electric lights and telephone.

Q. But the streets have not been accepted by the city as yet? A. The proceedings are not completed, the city would not accept the streets until 273 such time as the map was accepted, as I understand it, the amended map was accepted. They have been dedicated and they can't be changed, they can't be private streets because every person that owns a piece of property, and the public in general, have the perpetual right of egress and ingress to all parts of those streets, and the grades having been accepted by the engineers of the city and the streets having been accepted as laid down

by the engineers, there is very little possibility of anything ever changing those streets.

Q. When you speak about the streets being accepted, Mr. Dolittle, accepted by whom? A. Accepted by the engineers that laid out the map of the Borough of Queens.

Q. Although the engineer may have approved the laying out of the streets, approved the map, nevertheless those streets have not been accepted by the city up to the present time, have they? A. I would like to answer that question the way they do in the country by asking another one.

275 Q. I think you had better answer my question first. A. I doubt very much if the city has accepted one-tenth, or make it one-twentieth of the streets in the Borough of Queens to-day where all the public improvements are in and where your company is supplying gas.

Q. I do not think that answers my question. What I want to get at is whether these streets have become public streets at the present time? A. Yes; they are public streets.

Q. In the sense that they are used by the public?

Mr. DuBois: What do you mean by public streets, Mr. Patterson? Whe witness can't answer unless he knows what the question

276 is. The witness has answered that the streets are open to the public and used by the public and have been open and have been used by the public for many years. Now, does that answer what you mean by public streets?

Mr. Patterson: No, I want to know whether the city has accepted the streets.

Mr. DuBois: What do you mean by that?

Mr. Patterson: There is a point in the

proceedings when the city accepts title to the streets that they then become public streets.

Mr. DuBois: But a street may be accepted in a great many ways. Acceptance may be by user or by the city putting in lighting or paving. Acceptance does not have to be by a formal act of the city.

Commissioner Wood: A street is a traveled highway, as it were, and there is a perpetual easement over it, is there not?

Mr. DuBois: You are getting into a very indefinite line as to what makes a public street. 278

Commissioner Wood: I must confess I would have to consult the Law Department on that point, I am not an authority.

The Witness: I have consulted the Law Department and they can't tell me and the Title Guarantee & Trust Company can't tell me, so I really can't answer the question because the attorneys that I have consulted have been unable to tell me, and if you can tell me I will be glad to pay you a fee for doing so.

Mr. Patterson: I am on the other side of this proceeding, Mr. Dolittle. (Laughter.)

279

By Mr. Patterson.

Q. What I am asking you, Mr. Dolittle, is if you know the exact legal condition of the title to these streets at the present time, and I think from your answer which you just made you admit you do not know what the legal condition of that title is, is that correct? A. I know the condition thus far: As I say, Broadway and Alley Road, which are the two longest and principal streets through

our property have been highways for a hundred years or more.

Q. We are ready to admit that, that those two streets are highways. A. The other streets have been oiled by the city this year, the city has put water mains through them and has done work upon them.

By Commissioner Wood:

Q. Does the city maintain those streets? A. They have, as much as was necessary. The streets are only about five or six years old and they were well made when they were made and there has been little maintenance but the city has oiled them this year and has maintained them in good order.

Q. Are they curbed and flagged? A. They are curbed, flagged and gutters are put in. All streets are macadamized. One of them is an amiesite street, the first amiesite street that was laid in the Borough of Queens.

Q. What kind of a street? A. Amiesite pavement.

By Mr. Patterson:

Q. Were these improvements put in by your company, Mr. Dolittle? A. Most of them were; yes, sir.

By Commissioner Wood:

Q. And lots were sold with the understanding that those streets would be public highways? A. Yes, sir; and as far as we could we have dedicated the streets in every way we could and are ready, if Mr. Mathewson can tell us how, to get the city to accept the streets, ready to have the city accept them, glad to do it.

Commissioner Wood: I should think that would constitute a public street, Mr. DuBois, would it not?

Mr. Patterson: That is a legal question.

Mr. DuBois: I will accept your word for it, Mr. Commissioner.

Commissioner Wood: I will have to fall back on the Law Department for that.

The Witness: Our company will enter into an agreement to do that with the proper parties.

Mr. Patterson: I think that is a question that we will have to discuss, Mr. Commissioner, in our briefs. The mere willingness 284
of the association to have the city take those streets as public streets and care for them I do not think would constitute an obligation upon the part of the city to do so, nor would of itself make the street public streets.

The Witness: I beg your pardon, the city has maintained them and are now maintaining them.

Q. To what extent? A. All that is necessary.

Mr. DuBois: Maintenance by the city is usually accepted as proof of the public character of the streets.

Commissioner Wood: Yes. 285

Mr. DuBois: That is the strongest evidence on that subject.

Commissioner Wood: So I have always understood.

The Witness: If I may be permitted, I should like to show you and the counsel here some photographs of the streets that we are speaking of

Commissioner Wood: Do you desire to introduce them in evidence?

The Witness: I am perfectly willing to.

Mr. Patterson: I do not think there is any question as to the physical condition of those streets, Mr. Commissioner, the only question in my mind was whether these streets are public streets or private streets at the present time.

Commissioner Wood: Have you not cases —similar cases to this—in the past where you put gas mains in?

287 Mr. Patterson: I do not know, I think the company may have in some cases extended into private property.

Commissioner Wood: I can't hear you.

Mr. Patterson: I beg your pardon. I say I think doubtless in some cases the company has extended into private property, but in a case involving one of the companies somewhere in the County of Kings, Commissioner Maltbie ruled that extensions into private property could not be required only where the title to the streets was in the city.

Mr. DuBois: That was in a case though, where there were no streets at all, where there was no likelihood of the street ever

288 remaining in a position to be used by the company which laid the gas mains. That was at Ramblersville where there were no streets anywhere.

Commissioner Wood: Ramblersville down there by Jamaica Bay?

Mr. DuBois: Yes, where it is built out on the trestle, on the salt marsh.

Mr. Patterson: Ramblersville and Aqueduct, I think the application covers.

Mr. DuBois: The only question of public or private streets is whether the company is taking the risk of some day being obliged to move its mains from the position that they would be laid in. Now, I think Commissioner Maltbie's point was that at Ramblersville the company might be obliged to expend a large amount of money laying pipes which would in a few years have to be moved to what would be finally accepted as the street plan. In an improved locality such as Douglaston, or Douglas Manor, there is scant chance of the city laying streets in
290 positions other than positions now adopted by those who developed the property.

Mr. Patterson: There is that possibility, however, Mr. Commissioner, until the city does finally accept these streets.

Mr. Reeve: There were boardwalks in Ramblersville and Commissioner Maltbie said he would not do it because they tried to have pipes for gas there over boardwalks, and for counsel to take that point up is not quite fair in explaining why Commissioner Maltbie refused to do it. 90 per cent. of that was boardwalks, no comparison at all.

Mr. Patterson: I think the principle, your 291
Honor, is the same in both cases, as the reading of that opinion will show. All I am trying to do here is to bring out the facts, and state the reason for our objection.

Commissioner Wood: I think you can take an exception if you like, but I think we can go on the supposition that these streets are laid out down there, to all intents and purposes.

Mr. Patterson: They are laid out, but I think it is yet to be established that they are public streets. I think the evidence is that they have not been accepted by the city, proceedings have been instituted but not completed.

Commissioner Wood: But you say you have gone into streets in similar instances like that.

Mr. Patterson: Voluntarily. I do not think we can be compelled to go into private streets.

293 Commissioner Wood: As I understand it, the question is as to the convenience and necessity there. I think we will go ahead and take evidence on that and you can take an exception in regard to the condition of the streets if you like, and put it in the brief afterwards.

The Witness: Mr. Commissioner, may I also make a little statement right here while it is in my mind?

Commissioner Wood: Yes.

The Witness: I would like to go on record as saying that 50 per cent.—33 1-3 per cent. of the gas mains of this gas company are now laid in streets that are in the same
294 condition as the streets in Douglaston. In Bayside the map has not been accepted by the city. I do not think that all of Flushing itself has been accepted by the city and yet they are serving gas at those places and their mains have been down there for a number of years to my knowledge.

Mr. Patterson: That is all I care to ask Mr. Dolittle. That is all I wish to ask this witness, Mr. Commissioner. I would now

like to call Mr. Spear on behalf of the gas company.

M. H. SPEAR was called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. Patterson:

Q. Mr. Spear, what is your occupation? A. Secretary and General Manager of the gas company.

Q. New York & Queens Gas Company? A. New York & Queens Gas Company.

Q. And how long have you been connected with 296
that company? A. 12 years.

Q. And in the same capacity? A. Practically, yes.

Q. And prior to that did you have any experience in the gas business? A. Yes, with the Standard Gas Company, and then about a year and a half, in 1905 and 1906, I was with the Williamsport Gas Company in the same capacity.

Q. Williamsport, Pa.? A. Yes, sir.

Q. Now, at the last hearing, Mr. Spear, testimony was given that the development of Douglaston is about a mile and a half from your mains. What is the nearest point that your mains come to this territory, which is covered by this petition? 297
A. Well, our present main, low pressure main, is about a mile and a half from Douglaston, but it is entirely too small a main to supply that territory.

Commissioner Wood: Where does that stop?

The Witness: The easterly side of Bayside on the corner of Lawrence Boulevard and Tenth Street, but that is just a small four-inch main.

Q. Would it be possible from this main to supply the territory which is covered by this petition? A. No, sir.

Q. And from what point would you have to bring gas to supply this territory? A. From the gas works in Flushing.

Q. And would you be obliged to construct a new main from the gas works to this territory? A. Yes, sir.

Q. And what would be the distance from your works in Flushing to the nearest point in this territory? A. I think it is about six miles.

299 Q. And have you made an estimate, Mr. Spear, of the amount of mains that you would have to construct in order to supply the territory covered by this petition? A. Yes, sir.

Q. And what is the total number of feet which would be required to supply this territory? A. 86,948.

By Commissioner Wood:

Q. That is the trunk line main? A. Trunk line main and street mains.

Q. How long would the trunk line main be? A. I should say about eight miles.

Q. Eight miles? A. Yes.

300 Q. You just stated it was six miles from Flushing. A. But the trunk line would go through to the city line. I said six miles to Douglaston.

Q. This is the point under discussion now, Douglaston? A. But also Little Neck is in the petition.

Q. Oh, I see.

Mr. Patterson: In other words, you would have to extend your main trunk line beyond the nearest point?

The Witness: Yes, sir.

Q. How big a main do you propose to put in? A. Six-inch for a trunk line.

Q. And you have a four-inch main now as far as Bayside? A. But that is low pressure. We intended, in order to keep this cost down, of running it high pressure.

Q. Can't you make it high pressure on the four-inch main? A. Not on the low pressure mains. The low pressure main is a distribution at about three inches water pressure whereas, in high pressure we pump it up to several pounds pressure and reduce with house governors, makes a cheaper installation.

302

Q. You can't change your four-inch main then to a high-pressure main? A. No, sir.

By Mr. Patterson:

Q. Have you estimated the cost of extending the mains so as to serve this territory, the trunk line main and the various other mains which would be required? A. Yes, sir.

Q. And what do you estimate as the total cost of that construction? A. $66,731.69.

By Commissioner Wood:

Q. That includes eight miles of trunk line main and how much smaller main? A. Altogether, it figures 86,948 feet, and that would be about 19 miles.

303

Q. 19 miles, that would be about 11 miles of smaller mains and 8 miles of trunk line mains? A. Yes, sir.

Q. How big are your smaller mains? A. Two, three and four-inch.

Q. And they branch off at Douglaston and Little Neck? A. Yes, sir.

By Mr. Patterson:

Q. Have you prepared a statement, Mr. Spear, showing the amount of mains of various sizes which will be required to serve this territory? A. Yes, sir.

Q. Together with the estimated cost of supplying and laying those mains? A. Yes, sir.

Q. And have you also made an estimate of the amount of gas which would be consumed in this territory? A. Yes, sir.

Q. And what do you estimate as the total consumption from this territory? A. 6,075,000 cubic
305 feet.

Q. A year? A. Yes, sir.

Q. And what do you estimate as the profit to your company from the sale of this amount of gas per year? A. $574.09.

Q. And what percentage would this be upon the investment required for the construction of these mains? A. Eight-tenths of one per cent.

Q. A year? A. A year.

Commissioner Wood: How many houses are you taking into consideration?

The Witness: 332.

Commissioner Wood: 332 houses?

The Witness: Yes, sir.

306 Q. In reference to that, Mr. Spear, how many houses did you figure on as being in portions of this territory other than Little Neck? A. 219.

Q. Were those the figures given by the gentlemen who testified here at the previous hearing? A. They testified 225.

Q. I see. Have you made a canvass of the number of houses there? A. No, but when I got the numbered maps, I saw the difference of about five or six houses between my figures and theirs, but I

did not correct the figures because there is such a small difference.

Q. How many houses do you estimate as being in Little Neck? A. By actual count there are 113.

Q. And what was the testimony given here? A. 186.

Q. Have you made an actual count yourself of the houses in Little Neck? A. Yes, sir; I have.

Q. So that the total number of houses that you have figured on in making these calculations is 332? A. Yes, sir. I might say in that count we did not include Little Neck Hills; that is the only part of Little Neck we did not include.

Q. How many houses were there? A. I think 308
there were about eight or ten under construction.

Q. They are not completed at the present time? A. No, sir.

Q. Now, you stated that the total length of the mains required was 86,948 feet? A. Yes, sir.

Q. And that averages how much to a house? A. 262 feet.

Q. And the cost is how much per house? A. $201 per house, and those figures do not include any amount for engineering, supervision, contingencies, overhead charges, nor interest and taxes during construction.

Q. Now, I notice that you have figured a profit to the company at 9 cents and forty-five hundredths 309
per thousand feet of gas. Upon what do you base that estimate? A. Upon our sworn figures to the Public Service Commission for the year 1913.

Q. Can you state, Mr. Spear, whether the operations of your company during this year, the current year of 1914, are being conducted upon a more or less favorable basis to the company than 1913? A. Very much less favorable due to the increased cost of raw materials.

Q. In this statement which you have prepared, what have you taken as the average consumption for each consumer per year? A. Douglaston, Douglas Manor and Douglaston Park, I have estimated 20,000 cubic feet per consumer and in Little Neck 15,000 cubic feet per consumer per year.

Q. Why the difference between the two communities? A. Because Little Neck has smaller houses and a cheaper grade house.

Q. Are these figures based upon your observations as to consumption in other territories served by your company? A. Yes, sir.

311 Q. And are all of these figures which you have given, excepting in so far as you have stated them to be the result of actual count, or computation, based upon your experience in the other territories that you have served? A. Yes, sir.

Q. Is this the statement to which you refer as setting forth the various items of estimated cost and estimated receipt? A. Yes, sir.

Q. And the other matters as to which you have testified? A. Yes, sir.

Mr. Patterson: I offer that in evidence, Mr. Commissioner.

Mr. DuBois: May I see it?

(Handing statement to Mr. Du Bois.)

312 *By Commissioner Wood:*

Q. In laying that main to Douglaston and Little Neck you could tap off on the way and supply other places also, could you not? A. There are no other places to supply, Mr. Commissioner.

Q. There is Bayside, isn't there? A. We are supplying Bayside now.

Q. I mean if there is an increased population at Bayside. A. Our present low pressure mains

are large enough to supply Bayside and an increase for some time.

Q. There is Broadway and Auburndale down there too, is there not? A. Yes.

Q. Flushing, Bayside, Little Neck and Douglaston? A. Yes, we are supplying them now.

Mr. DuBois: I have no objection to this exhibit.

(The statement referred to was received in evidence and thereupon marked Exhibit No. 3 of this date.)

By Mr. Patterson: 314

Q. Have you prepared a statement showing the earnings and expenses of your company during the calendar year of 1913? A. Yes, sir.

Q. And is that the statement which you have prepared (handing statement to witness)? A. Yes, sir.

Q. And is that a correct statement of the matters therein set forth? A. Yes, sir.

Mr. Patterson: I offer that in evidence.

(The statement referred to was received in evidence and thereupon marked Exhibit No. 4 of this date.)

315

The Witness: I might add further that these figures are exactly the same as we filed with the Public Service Commission, the sworn figures.

Q. In your regular report to the Commission? A. Yes, sir.

Q. And that shows a profit of 9 cents and forty-five hundredths of a cent on a thousand cubic feet of gas? A. Sold? Yes, sir.

Q. And that is the basis upon which you have made your estimate of returns in this territory? A. Yes, sir.

Q. Now in making this computation as to the amount of gas which would be used in this territory, Mr. Spear, have you gone upon the supposition that all of the houses in this territory would use gas for heating? A. For cooking; yes, sir.

Q. For cooking? A. Yes, sir.

Q. According to your experience in similar territory, do all of the houses, is it likely that all of the houses would use gas for this purpose? A. Not at first; no, sir.

317 Q. Well, ultimately? A. Well, not all of them, but probably a territory like that there might be 85 or 90 per cent. of them.

Q. In the other territory that you serve what per cent. of your total consumers use gas to some extent for cooking purposes? A. 85 per cent.

Q. And what percentage of them use gas exclusively for this purpose? A. Without the coal range?

Q. Yes. A. About six per cent.

Q. And what percentage use gas for hot water heating? A. About 30 per cent.

Q. Would the 6 per cent. cover those who used it for cooking and hot water heating exclusively?

318 A. Yes, sir.

Q. What is your experience, Mr. Spear, as to the extent to which the 85 per cent. of your consumers who use gas for cooking use the same? A. I do not quite understand that question.

Q. The 85 per cent. who use gas for cooking and for water heating use it during only a portion of the year? A. Yes, sir; only about five months.

Q. And do they use it to any extent during the balance of the year? A. Simply for emergencies.

If they find the coal range does not happen to be just right they will cook a meal on the gas range.

Q. Mr. Spear, in your testimony you stated that these figures which you gave do not include any estimate for engineering, overhead charges and for interest on the investment during the construction and similar items. What is ordinarily considered a fair percentage of the actual cost of construction to cover these items? A. About 30 per cent.

Q. How much? A. About 30 per cent.

Q. In addition to the estimated cost? A. Yes, sir.

By Commissioner Wood: 320

Q. On how large jobs do you figure that? I mean construction projects, 30 per cent. for engineering? A. A job of this kind certainly ought to carry it.

Q. You mean that would be in addition to the $66,000? A. Yes, sir.

Q. You have your own engineers, do you not? A. Yes, sir.

Q. And you pay them by the year? A. Yes, sir.

Mr. DuBois: Do I understand Mr. Spear to say that the engineering cost would be 30 per cent.?

Commissioner Wood: 30 per cent.

The Witness: Oh, no, the engineering, supervision, contingencies, overhead charges, and interest and taxes during construction would amount to about 30 per cent. 321

Mr. DuBois: 30 per cent.?

The Witness: Yes.

Mr. DuBois: In addition to the $66,000?

The Witness: Yes, sir.

Commissioner Wood: That would be $32,000 in addition, about?

The Witness: About $20,000.

Mr. DuBois: Right at this point, I would like to have him divide that as between engineering and interest and overhead charges and so forth.

Commissioner Wood: It is simply a question of digging trenches and putting the pipes along the streets. There are no very difficult engineering features in that, are there?

The Witness: The engineering is figured about 15 per cent.

Commissioner Wood: 15 per cent. on the gross expenditures?

The Witness: Yes, sir.

323 Commissioner Wood: What does the engineering consist of? I mean in this particular instance?

The Witness: Laying out the preliminary work, following it up and seeing that it is done properly.

Commissioner Wood: It is only digging trenches, is it not?

The Witness: The gas pipe has to be laid to a certain grade.

Commissioner Wood: But you get your grades from the city.

The Witness: We have to lay grades in order to put in drips.

324 Mr. DuBois: That is about three or four times as high as our engineers' figures, I think, in the subway for engineering, and work of that kind, done by the engineers, and considered the most difficult engineering work in the city, nothing like 15 per cent.

Commissioner Wood: It strikes me as being a little high.

Mr. Patterson: Those are larger operations, Mr. DuBois.

Commissioner Wood: This is a pretty good size operation, $66,000.

Mr. DuBois: I would like to have some examples.

Commissioner Wood: Supposing you send us a detailed estimate of the cost of construction so that we can check it up. You will do that, Mr. Patterson?

Mr. Patterson: Yes, sir.

Mr. DuBois: Have it divided so we can see.

Commissioner Wood: That is, in detail.

326

By Mr. Patterson:

Q. What has been the policy of your company with respect to the construction of extensions which are more than 100 feet in length? A. We have asked the owner, or development company, or tenant, to deposit with us 75 per cent. of the cost and we have refunded 75 per cent. of the gas paid on the line until the amount they deposited is returned to them.

Q. And what was the offer which you made to the people in this territory in regard to the making of the extension and the deposit by them? A. If they would put up $10,000 that we would refund 25 per cent. of the gas bills paid until the amount was returned to them.

327

Commissioner Wood: I did not quite catch that.

The Witness: If they would deposit with us $10,000 we would render a statement each six months for gas bills paid on the lines laid and refund them 25 per cent. of that amount until the $10,000 was returned to them.

328 *Schedule B—M. H. Spear—Direct*

By Commissioner Wood:

Q. You say they deposit $10,000? A. Yes.

Q. Who would deposit $10,000? A. The residents of Douglaston, Douglas Manor and this territory to be supplied.

Q. You mean as a whole? A. Yes, sir.

Q. Was this brought out at the last hearing, the $10,000? A. Yes, sir.

Mr. Patterson: I think there was something in the correspondence about that.

Mr. Brownson: That was in my testimony, I think, Mr. Commissioner.

329

By Mr. Patterson:

Q. And have there been many instances, Mr. Spear, where your company has made extensions under an arrangement of this character? A. Yes, sir; a great many.

Q. And do you know whether such an arrangement is usual in this part of the country? A. Yes, sir; it is very general.

By Commissioner Wood:

Q. How big deposits have you received in instances like this? A. We have never had an instance as large as this, Mr. Commissioner, but some
330 of the real estate development companies have deposited with us as much as $4,000 for their own property and then have added to it as other extensions have been made.

Q. That is the corporations have deposited that? A. Yes, sir.

Q. Real estate corporations? A. Yes, sir; of course; that is where they want it directly in their own property.

Q. Deposited it in cash? A. Yes, sir.

By Mr. Patterson:

Q. Mr. Spear, have you gone over the maps which were furnished by the other side? A. Yes, sir.

Q. And copies which were furnished to you, I mean? A. Yes, sir.

Q. And on those copies have you indicated the mains which would be necessary for the proposed extensions? A. Yes, sir.

Q. And the colors on these copies indicate the different sized mains which would be required? A. Yes, sir.

Q. And what is indicated by the red coloring? A. Three-inch, and the brown is four-inch, and the 332
yellow is two-inch.

Mr. Patterson: I would like to offer these copies in evidence, Mr. Commissioner.

Commissioner Wood: They will be received.

By Mr. DuBois:

Q. These are the blueprints similar to those offered in evidence at the last session, but with the mains colored? A. Yes, sir.

Q. And it does not show any extended mains from Flushing to Creek, does it? A. No, sir; only as far as that map shows it, that is all.

333

Mr. Patterson: That map does not cover the territory through which the main would have to be extended?

The Witness: Not all of it; no, sir.

Q. Now, referring to the sheet entitled, "Bayside, Douglaston and Little Neck," you do not show any main at all on the west side of the creek, do you? A. No, sir.

334 *Schedule B—M. H. Spear—Direct*

Q. Why didn't you show that? A. Because I used that map simply for Little Neck, which made the extension from the boulevard in the Douglaston Park property east.

Q. Isn't it the fact that at the time you made these maps you did not believe it necessary to have an extension from Flushing to the Creek? A. Oh, no.

Q. You have always considered that as a necessary part of the scheme? A. Yes, sir; always.

Commissioner Wood: What creek is that?

The Witness: Alley Creek, just this side
335 of Douglaston, just west of Douglaston.

Commissioner Wood: Between Bayside and Douglaston?

The Witness: Yes, sir.

Commissioner Wood: Where the power house is there?

The Witness: Yes, sir.

Mr. DuBois: I have no objection to these being received in evidence as one exhibit if the stenographer will fasten them together.

(The blueprints referred to were received in evidence and thereupon marked Exhibit 5 of this date.)

By Mr. Patterson:

336 Q. I show you this map of the Third Ward of the Borough of Queens, Mr. Spear, and ask you if on that you have indicated the mains which it would be necessary to build on the west side of Alley Creek? A. Yes, sir.

Q. In order to supply this territory? A. Yes, sir.

Q. And how is that indicated on this map? A. The red and the blue lines.

Q. And what does the red line indicate? A. Four-inch lines running from gas works to Sanford Street and Broadway, and the six-inch running from Broadway to Main Avenue; Douglaston; east on Main Avenue, Douglaston, would be, four-inch on Broadway.

Mr. Patterson: I offer this map in evidence.

(The map was received and marked Exhibit No. 6 of this date.)

Mr. DuBois: This is a map entitled, "Map of the Third Ward, Borough of Queens, City of New York, compiled from surveys by E. 338 A. Roullier, Civil Engineer, dated January, 1898."

The Witness: This map has been corrected in 1910, I think it was, or 1911, by Mr. Haviland, who was the City Engineer, because there were a great many developments which Mr. Roullier could not put on, and that compelled Mr. Haviland to.

By Commissioner Wood:

Q. Has that map been adopted by the city, tentatively? A. No, sir; nothing to do with that.

Q. Has any part of the Borough of Queens map been adopted by the city? A. Yes, sir; various parts. 339

Q. Down by Long Island City and around there? A. Yes, and a part of Flushing, I don't know just exactly how much of it.

By Mr. Patterson:

Q. Mr. Dolittle has asked the question, Mr. Spear, why a smaller main is used nearer the works than is used over towards Alley Creek. A. Because we

now have a four-inch low pressure main going from the gas works through these streets marked with the red line to Sanford Street and Broadway.

Q. You could use the two four-inch lines together in connection with this service? A. Yes, sir.

Mr. Dolittle: It would not be necessary to run a main from the gas plant out to Douglaston, a new main, as you have testified, would it?

The Witness: Yes, sir.

Mr. Dolittle: Why?

The Witness: Because we have only a
341 four-inch line now running from the gas works to Sanford Street and Broadway, and that is not sufficiently large to take on additional territory.

By Mr. Patterson:

Q. And you would run another four-inch main from the gas works to Sanford Avenue, and then six inches from that point on? A. Yes, sir.

Q. The six-inch main connecting with the two four-inch mains? A. Yes, sir.

By Commissioner Wood:

Q. Where is Sanford Avenue and Broadway? A. In Flushing, that is, about two miles and a half
342 from the gas works.

Q. In other words, you would have to extend your six-inch main about four miles? A. I think about that; yes, sir.

Q. Would that make any difference in your estimated cost then? A. No, sir; that is what I have estimated.

Mr. Dolittle: But he testified that they would have to run a six-inch main from the gas works out.

Commissioner Wood: That is what I understood him to say.

By Mr. Patterson:

Q. If you made that statement, do you wish to correct it, Mr. Spear? A. Yes, sir.

Mr. DuBois: He said the four-inch main from the gas works up.

Mr. Dolittle: Excuse me.

By Mr. Patterson:

Q. Mr. Spear, have you examined the records of the City of New York with reference to the ownership of streets in this territory? A. Yes, sir. 344

Q. What records have you examined? A. The maps in the Topographical Department, Borough of Queens.

Q. And do those maps purport to show what streets are public streets and what streets are private streets?

Commissioner Wood: What do you mean by public streets? Give us the definition.

Mr. Patterson: I mean streets in which either the legal title has been vested in the city, or where the city has acquired an easement as distinguished from streets where there may have been some attempt to dedicate and where the public may be using the streets, but where the city has no legal title and no legal easement. 345

Commissioner Wood: Well, the city acquires an easement when the public go over the streets, use the streets.

Mr. Patterson: I do not think so, Mr. Commissioner.

Commissioner Wood: Well, that will be discussed in the briefs anyway.

Mr. Patterson: Yes.

By Mr. Patterson:

Q. Have you indicated on this map which I now show you, Mr. Spear, the streets which are public streets in this territory according to the records of the Topographical Bureau? A. Yes, sir.

Q. That is a correct showing according to the records in that office? A. Yes, sir; indicated by blue pencil.

347 Q. The public streets are indicated in blue pencil? A. Yes, sir.

Mr. DuBois: I am going to object to that.

Mr. Patterson: I offer that in evidence.

Mr. DuBois: I object to the map being received in evidence. This is a legal question whether these streets are public or private streets and it is one that is much disputed and can't be proved by simply asking a secretary of a gas company whether he has looked at the topographical maps or not.

Mr. Patterson: This is a sworn map, amounts to a sworn copy of what is shown by the records.

348 Mr. DuBois: I do not admit that the records are correct in the first place and certainly not that the copy made is correct.

Commissioner Wood: I think it can be admitted with the understanding that the objection has been made along the lines you state; it may be received for what it is worth.

Mr. DuBois: But my point is that it is worth nothing, that the question of the character of these streets is an intricate legal question and depends upon a great many

facts that could not possibly be shown on the Topographical Bureau maps. No man could show, for instance, whether the city had spent money in preparing a certain macadamized street or in certain other ways, and it is an intricate question of fact and one that can't be proved from any map.

Commissioner Wood: I understand that briefs will be submitted on that question and then the Commission can decide from those briefs. In the meanwhile that is simply a map that is introduced by the gas company.

Mr. DuBois: If it is introduced as his understanding of what are public and what 350
are private streets, I have no objection to it.

Mr. Patterson: This is introduced as showing what the records in the Topographical Bureau show.

Mr. DuBois: It may be received subject to verification by some of the citizens down there as to whether the Topographical Bureau maps do show these streets. I have no objection to that.

Commissioner Wood: I think it may be received under those conditions.

(The map referred to was received in evidence and thereupon marked Exhibit No. 7 of this date.)

351

By Mr. Richle:

Q. I would like to ask the witness one question: Would you open a street down there without getting a permit from the city? A. We would apply to the city for a permit.

Q. Would you open a street without a permit? A. Not without first applying to the city for a permit.

Mr. Dolittle: Would you open a street without a permit?

The Witness: Not without first applying for the permit.

By Mr. Riehle:

Q. Would you open the street without a permit? Wouldn't the police arrest you? A. Not if the Department had said it was private property and they would not issue a permit on it.

Q. Have you opened a street down there without permission? A. Yes, sir; where the Department
353 makes the statement that they will issue a permit on it we will go ahead. We had that come up on property in Bayside, Flushing.

By Mr. Patterson:

Q. If you apply for a permit, Mr. Spear, it would be with the idea of avoiding any question? A. Yes, where we do not know which are private and which are public streets.

Commissioner Wood: You would get the owner's consent if it were prevate property?

The Witness: We do not stop to look into whether a street is private or public. We get an application for gas and we make an
354 application for a permit.

Mr. Riehle: We can't open a street down there anywhere, Mr. Commissioner, without getting a permit from the city, and that applies to our property and Mr. Dolittle's property or anywhere in Douglaston; you can't open a street without a permit.

Commissioner Wood: What do you mean by opening the street?

Mr. Riehle: To make improvements to connect water pipes, or to put an electric wire

across or to set a pole, or anything, and we have conceded to the city the streets of Marathon Park—we had to do that before they would put in water or gas or electric lights, and the same applies to Mr. Dolittle, too.

Commissioner Wood: The city would not put in water pipes unless they had title to the streets.

Mr. Riehle: Certainly not.

Mr. Dolittle: And furthermore, the city has not only put water mains through all of those properties that we have been talking about, but they have repaved Douglas 356
Manor. Isn't that correct, Mr. Brownson?

Mr. Brownson: That is correct.

Commissioner Wood: Do you know those to be the facts, Mr. Spear?

The Witness: I do not, Mr. Commissioner. But I do know that the city has in a great many cases with development companies given them water pipe if they would install it in the ground.

Commissioner Wood: The pipe is the property of the city, though, and private people can't take it out?

The Witness: No, the mains are the property of the city and in those cases the streets 357
have not been ceded to the city.

Commissioner Wood: That is a perpetual easement, though, in those streets—but that will be discussed in the briefs.

Mr. Brownson: Mr. Commissioner, may I say just a word on that tentative matter?

Commissioner Wood: Yes.

Mr. Brownson: I have had that under supervision for sometime and I would like to say that the entire Borough of Queens

has been accepted in a tentative manner and this new map includes the entire borough right out to the city line through our place and everything. There are a few new streets on the map and all the other streets are just as they are on this map that I have furnished.

Mr. Patterson: Accepted by whom?

Mr. Brownson: Accepted by the Board of Estimate and Apportionment of the City of New York on January 23rd, 1914.

359 *By Mr. Patterson:*

Q. Mr. Spear, something was said at the last hearing about the rate which might legally be charged for gas in the adjoining territory. In Nassau County, do you know what the legal rate is in that county? A. Well, I do not think it has a legal rate, Mr. Patterson, but they charge $1.50 per thousand, less 10 per cent. if paid within 10 days.

Mr. Riehle: Less 15 cents.

The Witness: What is 10 per cent?

Mr. Riehle: 15 per cent.

The Witness: Ten per cent., that makes $1.35 net.

360 *By Mr. Patterson:*

Q. When you say there is no legal rate, you mean that there is no limit upon the rate which may be charged in that territory? A. Yes.

Q. The rate in the Third Ward in the Borough of Queens established by law is $1.00 per thousand? A. Yes.

Mr. Patterson: That is all with this witness.

Cross examination by Mr. DuBois:

Q. Mr. Spear, you have been in communication with Mr. Brownson and Mr. Dolittle in the past with regard to furnishing gas to Douglaston Manor and Douglaston? A. Yes, sir.

Q. And you have written letters to Mr. Brownson, October, 1913, and in June, 1914? A. I do not recall the dates, Mr. DuBois.

Q. But you did write him in regard to the terms on which you would extend the gas mains to serve this territory? A. Yes, sir.

Q. And in that you stated that you would be willing to make the extension if they would be 362
willing to advance $10,000 towards the cost? A. Yes, sir.

Q. Now, in your letter of October 11th, 1913, did you, or did you not, state that it would require 43,000 feet of main alone for only 170 houses? A. I did.

Q. What were you thinking of when you stated that, 43,000 feet of main pipe? A. We were figuring at that time on simply taking the houses that would be close to main line going through; for example, if a house were four or five hundred feet away, we would not run to it.

Q. Did you figure in a four or six-inch main from Flushing down to the creek? A. Yes, but I did 363
not figure at that time—that was a year ago—I did not figure at that time on running from Sanford Avenue and Broadway back to the gas works, but this year the pull has become so great on that——

Q. The what? A. The pull, the consumption from that line.

Q. From what part of that line? A. From that point, the Sanford Avenue and Broadway, that we would have to, to give adequate service, to run back to the gas works.

Q. That is a growing section, isn't it? A. Oh, yes.

Q. And houses being built in that neighborhood all the time? A. Yes.

Commissioner Wood: Where is Sanford Avenue and Broadway? Is that in the section they call Broadway down there?

The Witness: Just about, yes, it is about——

Mr. Riehle: Parallels Broadway about 300 feet to one side.

The Witness: It is about a half a mile
365 east of the Broadway-Flushing station.

Commissioner Wood: It is this side of Auburndale?

The Witness: It is about a half a mile east of the Broadway-Flushing station, Long Island Railroad.

Mr. Patterson: This map shows that.

By Commissioner Wood:

Q. Now, isn't it the fact, Mr. Spear, that whether you serve this territory or not you would be obliged in the near future to put in additional mains to serve that part of Flushing? A. No, sir.

Q. You have an adequate supply then there now, have you? A. Yes, sir.

366 Q. And adequate for a considerable amount of increase in consumption? A. I think so, yes.

Q. And by that you mean three or four hundred more houses could be supplied from that main? A. Well, that main does not supply directly to the houses, Mr. DuBois. It simply goes through governors into the low pressure main and brings up the pressure of the low pressure main at that point.

Q. But you have a margin of supply of gas on your present main system as far as Alley Creek?

You have enough, you are not pinched? A. No, we haven't any main to Alley Creek.

Q. You have a main to within a few hundred—within less than a thousand feet of Alley Creek? A. Four-inch main; yes, sir.

Q. And that is adequate to whatever country has to be supplied in that vicinity? A. Oh, no, supply houses built directly on that line, but we could not extend it from there and take in other houses.

Q. Well, why not? A. Because you can run a gas main so far that you won't get any gas out of the end of it, on account of friction.

368

By Commissioner Wood:

Q. What Mr. DuBois means, probably, is the same question that I asked you a while ago: That if you put in this new six-inch low pressure main, couldn't you utilize that for supplying the growth that will come to Broadway and Auburndale and Bayside? That is what you mean, Mr. DuBois, isn't it?

Mr. DuBois: Yes.

The Witness: We might utilize it if we had to, but I do not see the necessity for it now.

By Mr. DuBois:

Q. But it is growing out there? A. To some extent; yes, sir. 369

Q. When you added to that two or three hundred more houses you would have to put in a supplemental main, wouldn't you, whether you extended to Douglaston or not? A. No, sir; we would not.

Q. Well, then, why do you have to put in a supplemental main to serve the same number of additional houses in Douglaston? A. Because we would have to extend from the end of that main. You understand that our mains are laid in a net work,

you might call it, and tied in at different points, so that we don't lay all four-inch main, we don't lay all six-inch main, we have some eight, have some ten and twelve and those are tied in so that the gas gets a circulation. If there is not enough on this line, another line comes around to help that out.

Q. Now, when you figure your 43,000 feet that you mentioned as being necessary in October, 1913, did you include any six-inch or four-inch main in Flushing itself? A. Yes, sir.

Q. And running away back to your gas plant?
371 A. No, sir; starting from Sanford Avenue and Broadway.

Q. You figured that in? A. Yes, sir, and another thing, Mr. DuBois, Little Neck was not considered at that time with those figures. There was no pipe figured for Little Neck.

Q. But did you figure a pipe as far back as Sanford Avenue? A. Yes, sir.

Q. Now, what pipe are you figuring on now in addition to that 43,000 which you figured in October, 1913? A. About 14,000 feet of four-inch pipe.

Q. And that would be laid where? A. From Sanford Avenue and Broadway back to the gas works.

Q. And that is the only additional pipe? A. And
372 Little Neck.

Q. Take that from Sanford Avenue back to the gas works, how many feet is there of that? A. About 14,500 feet, I think it will figure.

Q. And that is of the four-inch main? A. Yes, sir.

Q. And that is the only additional expense to that which you had in mind on October 11th, 1913, with the exception of what might be necessary to supply Little Neck? A. And also, we did not figure

on as many houses in Douglas Manor or in Douglaston.

Q. You figured on 170 houses? A. Yes, sir.

Q. And now you figure in those two places on how many? A. 194.

Q. Now, at that time you stated, did you not, in your letter of October, 1913, "I used a consumption per meter extremely high and even then could not make it show three per cent. on the investment," and in a later letter of June 24th, 1914, addressed to Mr. J. S. Brownson, did you not state, "That a return of approximately 2½ per cent. would be shown on the investment"? A. I think so, if that is in the letter. 374

Q. What did you mean by "A return of approximately 2½ per cent. on the investment"? A. That would be the net return that we would get.

Q. And that is what you had in mind at that time? A. Yes, sir.

Q. And in your conversation with Mr. Dolittle and Mr. Brownson you had in mind that the return would be something over two and less than three per cent.? A. About that; yes, sir.

Q. And do you still have that idea of the investment and return? A. No, sir.

Q. You know of more houses than you did at that time, do you not? A. Yes, sir.

Q. And you know of what additional expense 375
which you did not think of then? A. Well, the line running back to the gas works, the installation of compressor in order to take care of it—an additional compressor and the lines of Little Neck and the additional houses at Douglaston.

Q. You stated $66,000 as being the estimated cost of the labor and material necessary to lay the mains and pipes to serve these three communities? A. Including services and meters and governors.

376 *Schedule B—M. H. Spear—Cross*

Q. And you figure 15 per cent. of that $66,000 as being the amount necessary to pay the engineers for doing the work? A. I have not figured that in here at all, on these figures.

Q. You gave that in answer to my question a few minutes ago as being the approximate cost of the engineering which would be added to this $66,000? A. I think probably it will amount to that; I haven't gone into that figure very carefully at all.

Q. That would amount to about $10,000 for doing the engineering work in laying these mains and services, is that correct? A. I think about that; I
377 haven't, as I explained, I haven't gone into these figures at all, to see just what the cost would be.

Q. You answered the question of your counsel that the percentages would run to about 35 per cent. A. I thought it would run about 30 per cent.

Q. You must have had some information as to what made up that 30 per cent. A. I think that in other cases that have been before the Commission, or the court, it is my impression that 15 per cent. has been allowed for engineering.

Q. But you were giving 15 per cent. as the amount you thought correct. Do you think 15 per cent. is the correct amount or do you not? A. Well, I think it might go up as high as that, yes.

Q. The work would be done by engineers now in
378 your employ, wouldn't it? A. Possibly we might have to get outside engineers; we have a very difficult proposition.

Q. What engineering force have you at the present time? A. Simply myself.

Q. You are the only engineer in the employ of the company? A. Yes, sir.

Q. And you do all the engineering work? A. Yes, sir, excepting when I find it necessary to get any consulting work.

Q. How long would it take you in your estimation to do the engineering work on laying out this scheme of extension? A. Oh, I don't know.

Q. You would not abandon all the other work for the company, would you? A. No, sir.

Q. Nor all your other duties? A. No, sir.

Q. How long a period would it take to get the work completed from the time it was begun? A. I would say probably—you mean to lay the mains and make the installation?

Q. Yes. A. Four or five months.

Q. And what is your salary a year? A. $4,000.

Q. And what engineers are under your employ now assisting you in the work? A. There are none, now. 380

Mr. DuBois: I would like, Mr. Commissioner, to have a chance to investigate the technical questions here and have our gas engineers go over the questions of cost and the necessary extension of mains. I had assumed from the correspondence that the only work that was necessary was the work outlined in these letters of Mr. Spear's, and Mr. Spear now states that other mains will be necessary and I would like to have that checked by our gas engineers.

Commissioner Wood: I understand that Mr. Patterson has promised to submit a detailed statement of the cost of material and labor and engineering. 381

Mr. Patterson: I think that is in evidence, Mr. Commissioner. We specified various mains that would be required, the number of feet and the other items.

Mr. DuBois: But nothing that included this line running back, I think, in Flushing.

The Witness: Yes, it is all included in this statement here.

Mr. DuBois: Oh, you mean submitted to-day?

Commissioner Wood: No, no; not to-day.

The Witness: Submitted now.

Mr. DuBois: He means submitted now.

Commissioner Wood: There are so many feet of such size of mains and so many feet of the other size of mains and the cost of excavation and the cost of laying the mains, that can't be a very difficult job.

The Witness: That is all in detail here so that the gas engineer can check this up.

383 Commissioner Wood: That is what you want then, Mr. DuBois.

Mr. DuBois: Yes.

Mr. Patterson: Do you want it more detailed than this, Mr. DuBois?

Mr. DuBois: No, I want to have our engineer check it up. I mean at the last session before this there was nothing before us which I could refer to our gas engineers to check up the cost.

Commissioner Wood: If it is there, that is what you want; if it is not sufficient, you may ask Mr. Patterson for such additional information as you may suggest.

384 Mr. DuBois: I should like to have that checked up.

Commissioner Wood: Yes.

Mr. DuBois: I would like to reserve further cross examination of Mr. Spear after I have had a chance to look over the exhibits that have been introduced in evidence.

Commissioner Wood: Shall we adjourn for to-day?

Mr. DuBois: I would like to adjourn.

Mr. Patterson: I have another witness I wish to put upon the stand.

Mr. DuBois: I am perfectly willing to suspend the cross examination of Mr. Spear until a later session and allow Mr. Patterson to put another witness on if he desires, or not, just as the Commissioner desires.

Commissioner Wood: What do you desire, Mr. Patterson?

Mr. Patterson: I have another witness here.

Commissioner Wood: Would you rather do it to-day or the next time?

Mr. Patterson: Just as you prefer.

Mr. DuBois: Suppose we have the record an unbroken chain of Mr. Spear's testimony 386
and not divide it?

Mr. Patterson: I am willing.

Commissioner Wood: We will take an adjournment for how long?

Mr. DuBois: About a week will suit me.

Commissioner Wood: Say a week from to-day at the same time.

Mr. Reeve: Mr. Van Steenbergh was called out of town last night on a very important case and if we could have it on Friday it would suit him.

Commissioner Wood: A week from to-morrow at half-past ten.

Mr. Reeve: That is agreeable. 387

Commissioner Wood: A week from to-morrow at half-past ten.

(Whereupon, at 12 M., on the 13th day of August, 1914, the hearing in the above-entitled matter was adjourned to Friday, August 21st, 1914, at 10.30 A. M.)

Next Exhibit No. 8.

388 *Schedule B—Proceedings*

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

IN THE MATTER of the Hearing on the Motion of the Commission, on the question of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent 389 as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.	Hearing Order in Case No. 1856.

New York City, August 21st, 1914.

Met pursuant to adjournment at 10.30 A. M.

Before: J. SERGEANT CRAM, Commissioner.

Appearances:

ARTHUR DUBOIS, Esq., Assistant Counsel for the Public Service Commission for
390 the First District.

Mr. DuBois: This case will be adjourned until next Thursday at 11.00 A. M.

(Whereupon, at 10.30 A. M., the hearing in the above-entitled matter was adjourned to Thursday, August 27th, 1914, at 11.00 A. M.)

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

IN THE MATTER

of the

Hearing on Motion of the Commission, on the question of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.

Hearing Order in Case No. 1856.

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Met pursuant to adjournment at 11.10 A. M.

Before: ROBERT C. WOOD, *Commissioner.*

Appearances:

ARTHUR DUBOIS, Esq., Assistant Counsel for the Public Service Commission for the First District.

JAMES S. BROWNSON, Esq., Chairman of the Douglaston Civic Association. 393

JOSEPH W. DOLITTLE, Esq., representing the Douglaston Realty Company.

F. H. REEVE, Esq., representing Mr. Joseph P. Day, Agent for the Dwight Murray Realty Company.

JOHN M. RIEHLE, Esq., representing the Long Island Sound Realty Company.

New York City, August 27th, 1914.

Messrs. KRAUTHOFF, HARMON & MATHEWSON, representing the New York & Queens Gas Company, by EDWARD J. PATTERSON, Esq., of Counsel.

H. M. SPEAR, Secretary and General Manager, for the New York & Queens Gas Company.

WILLIAM H. VAN STEENBERGH, Esq., a resident of the District, appearing in person.

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395 Mr. DuBois: Mr. Commissioner, this is an adjourned hearing in Case No. 1856, in the matter of extending the gas mains serving residents of Douglaston and Little Neck. Since the last hearing I have had our gas engineer make an examination of the figures introduced in evidence by the Gas Company as to the cost of the extension. I will ask Mr. Hine, our Chief Gas Engineer, to take the stand.

Mr. Patterson: I had understood that the adjournment was for the purpose of completing Mr. Spear's cross examination, and I would ask, if it would not be the orderly procedure to complete that at this time.

396 Mr. DuBois: I decided not to ask Mr. Spear any more questions. That finishes with Mr. Spear.

Mr. Patterson: I had other witnesses and I might want to ask Mr. Spear some further questions. I do not want to waive my right to do that, also to call some other witnesses.

Mr. DuBois: Then I will withhold Mr. Hine.

H. M. SPEAR was recalled for further examination and, having been previously sworn, testified as follows:

Direct examination by Mr. Patterson:

Q. You testified that in addition to this cost of approximately $66,000 for these proposed extensions, you estimated a further expense of 30 per cent.? A. Yes, sir.

Q. And you stated that in that 30 per cent. you included engineering expenses, contingencies, taxes and possibly one or two other items. Will you just state again the items that you included in that 30 per cent., with any additions? A. Engineering and 398 supervision, contingencies, overhead charges, interest and taxes during construction, contractor's profit.

Q. In the figures which you gave, $66,000, did you include any contractor's profit? A. No, sir.

By Commissioner Wood:

Q. Do you usually do work of this kind or do you let it out? A. Usually we let it out, except on small work.

Q. You do the small work yourselves? A. Yes, sir.

Q. On what basis do you usually let it out? A. So much a foot. We get a price from the con- 399 tractor.

Q. It is a net price? A. Yes, sir.

Q. And those prices are pretty well established, I suppose? A. Well, usually, yes, depending upon the territory.

Q. There is no rock down there, is there? A. No, sir.

Q. What proportion did you allow in that 30 per cent. for engineering? A. I haven't done any figuring on that. I did not make any allowance.

I simply put a memorandum on those figures. We had not included those items.

Q. It is just guessing as to the 30 per cent.? A. Yes, sir.

By Mr. Patterson:

Q. What have your extensions amounted to annually, during the period you have been with the company, Mr. Spear? A. From about two to five miles a year.

By Commissioner Wood:

Q. How many years have you been with the com-
401 pany? A. About twelve.

By Mr. Patterson:

Q. And what is the total amount of mains your company now has in the ground? A. About 99.

Q. And this proposed extension would be about what per cent. of the total? A. About 18 per cent.

Q. And these extensions you have made of about from two to five miles, have those been in single extensions or perhaps a number of extensions? A. Most of them very short distances.

Q. Making a total in the year of from two to five miles? A. Yes, sir.

Q. Have you an engineering organization, Mr.
402 Spear, that you could put upon an extension of this size and character? A. No, sir.

Q. Would you deem it necessary to employ outside engineers for the purpose? A. Yes, sir; I would.

Q. For what features of the work? A. Well, for the entire work; laying out the preliminary work, going over the ground to see what the consumption would be, and laying out the proper size mains, and then the supervision.

Q. Supervision of construction? A. Of construction, yes.

By Commissioner Wood:

Q. Do you depend upon outside engineers to estimate the probable income of your company, in laying the mains? A. We would have to in a large case of this kind. I would not be able to take care of it. I have to take care of the operating still. I have everything to take care of there.

Q. It is not a very difficult engineering feat to dig trenches and lay down mains? A. No. This would mean an increase of 18 per cent. to our existing system. It would be a very large increase and difficult engineering. 404

Q. In what way? A. To see what the proper service was, to go into a territory of that kind.

Q. The proper pressure and mains? A. To see that they are laid out properly.

Q. Is this a low pressure system? A. No; a high pressure. If we laid that out as a low pressure system, it would probably cost three or four times as much as high pressure.

Q. Why do you put on high pressure, on account of the distance? A. No, sir. Trying to get the figure down as low as we could.

Q. You mean it is cheaper for high pressure than for low pressure? A. Yes; for a location of that kind. 405

By Mr. Patterson:

Q. Have you, in your employ, an organization that could do the actual construction of this work? A. No, sir.

Mr. Patterson: I think that is all.

Cross examination by Mr. DuBois:

Q. What engineers have you employed in the past for similar work? A. We have never done any similar work.

Q. You have done extensions? A. Yes; but they have been all short, one hundred feet, two hundred feet to a thousand feet.

Q. Who laid the original system—was that before your day? A. Yes. The company was started in 1854.

Q. Didn't you state at the last session, in answer to my question, that you would do this work your-
407 selves? A. Yes.

Q. Isn't that the fact? A. Yes; but they are all small pieces.

Q. That you would do this work to Douglaston or have charge of that work and do the engineering yourself? A. No, sir; I don't think I did.

Q. Are you competent to do the engineering required in this work? A. Possibly if I gave my entire time to it. I could not do that.

Q. There is nothing here so difficult that you are not able to do it? A. Well, crossing the meadows there and crossing the creek, I would not attempt that myself.

Q. What type of engineer handles that kind of work? A. Similar to Humphreys & Miller and For-
408 stall & Robison.

Q. They make a specialty of that kind of work? A. Yes.

Q. You gave the estimated figure of cost of doing that work under the creek as $1,000? A. Yes, sir.

Q. That is not very intricate or difficult work, is it? A. Yes; I think it will be. In the first place it is a navigable stream and we will have to find out from the Government just what they will re-

quire. If the pipe will have to be buried, a special pipe will have to be used.

Q. What was the last extension you made to your distribution system? A. I cannot recall any long extensions at all.

Q. What was the last one of half a mile or more? A. I would say probably Queens Borough Hill was the last that we extended, that would be about half a mile.

By Commissioner Wood:

Q. How big an area does your franchise cover? A. The entire Third Ward of the Borough of 410 Queens.

Q. How much in square miles? A. I could not tell you that.

Q. About how much? A. I don't know.

Commissioner Wood: Have you any idea, Mr. Patterson?

Mr. Patterson: I would not like to state, Mr. Commissioner, offhand. It is so irregular I would not like to estimate upon it.

The Witness: That map, I think, is the entire Third Ward and that scale is about 800 feet to the inch.

Mr. DuBois: I think that is all.

Mr. Patterson: I will call Mr. Thomas. 411

Mr. DuBois: Mr. Van Steenbergh wants to ask the witness a few questions.

By Mr. Van Steenbergh:

Q. How many additional houses in Bayside will the present mains which you have laid there supply? A. I don't know.

Commissioner Wood: Just repeat that question.

Mr. Van Steenbergh: I asked him how many additional houses would the present mains supply in Bayside, confining his answer to Bayside alone.

Q. You say you cannot answer that question? A. Yes, sir.

Q. You have attempted to answer or give some information to this Commission as to the capacity of the present main running from Flushing, from your plant at Flushing to Bayside, have you not? A. No, sir.

Q. You have not? A. No, sir.

413 Q. Can you give that now? A. No, sir.

Q. Why can't you give it? A. Because it would require considerable figuring to see what it would be.

Q. Haven't you attempted to impress this Commission with the notion that it would be an absolute necessity to lay down a supply main in order to meet the additional demand which might exist at Douglaston and Little Neck? A. Yes, sir.

Q. And you have furthermore stated, in your previous examination, that the present main which was located there was not sufficient to supply? A. Yes, sir.

Q. Now, if that is the case, why cannot you give
414 me an answer to my previous question? A. Because it makes a big difference whether houses are built on the present mains or whether they are built on extensions from those present mains.

Q. How much of an effort would it be on your part to furnish that information to this Commission? A. I don't know how long it would take. It would take considerable time to figure it out.

By Commissioner Wood:

Q. You could have that easily compiled in your office? A. I doubt if we could. We could get an engineer to do it.

Commissioner Wood: As I understand, you want to know the number of houses which are supplied?

Mr. Van Steenbergh: No.

The Witness: That is not what he said. He asked how many additional houses——

Q. You know your pressure, you know how many houses you have got at the present time? A. There 416
are a lot of things to take into consideration; the size of the mains and where they go, the pressure at different points, where the houses would be built, whether built on the present line or small extensions from that. It is a big job.

Q. I should not think it would be to people whose business it is to do that? A. I don't know of any case where that has ever been done.

Q. Do you mean figuring on the prospective business? A. Yes, sir.

By Mr. Van Steenbergh:

Q. Don't you know what the capacity of your present main is and how many additional houses 417
it will supply? A. No, sir.

Q. Houses located with reference to the main, a reasonable distance? A. No, sir.

By Commissioner Wood:

Q. Surely you must have that in your company departments? A. No.

Q. Nobody in your company knows the capacity? A. Certainly we know the capacity of the present

mains. We don't know how many additional houses we can take on.

By Mr. Van Steenbergh:

Q. How many additional consumers would your present main supply? A. I don't know. I have never figured on it.

By Commissioner Wood:

Q. I suppose your consumers have got to be within a reasonable distance of your main, otherwise you could not supply them, could you? A. No, sir.
419 The present consumers are of course all on our present main.

Q. I said within a reasonable distance. There seems to be some doubt in your mind as to how many you could supply, depending on the distance from the main, is that it? A. It depends upon the size of the trunk mains, the size of the lateral mains, and just where those houses are built.

Q. That is what I say, the distance from the trunk main? A. I mean in each section they are building——

Q. You have only the one trunk main down there? A. To Bayside?

Q. We are talking about Bayside only? A. We have two lines running into Bayside.
420

Q. We are talking about the main line running into Bayside. Using the average distance of the houses in Bayside from the main? A. I don't know.

Q. You can figure that out and give the information to the Commission.

Commissioner Wood: Don't you think that would be useful, Mr. DuBois.

Mr. Dubois: I have tried to get somewhat similar information. It is a little more diffi-

cult than it seems. I imagine the difficulty is you have got to more or less locate your houses, in order that the engineer may know how his feed system and his distribution is to be laid out.

Commissioner Wood: Take the average distance.

Mr. DuBois: We have our own engineer and you may ask him, but I doubt if he can give it.

By Mr. Van Steenbergh:

Q. Would it not be possible, Mr. Spear, to supply 422
Little Neck and Douglaston with your present main, that is, assuming it was extended to those points, and use a new main to supply such additional demand as may hereafter exist at Bayside? A. No, sir.

Q. It would not? A. No, sir.

Q. Why not? A. Becuse we haven't any high pressure there, as far as Bayside, and if we figure on a low pressure into Douglaston, Douglas Manor, Douglas Park and Little Neck, it is going to increase the cost very materially. We never lay low pressure mains as two-inch pipe, and most of that pipe on my estimate is two-inch.

Q. You have estimated it would cost at least 423
$66,000 to lay a main from your works at Flushing to Douglaston and Little Neck? A. And the laterals, yes, sir.

Q. You could supply such additional demand as might hereafter exist at Bayside from that, and you would, I suppose? A. We might, if we reached that point, yes.

Q. You did not separate the items going to make up the item of $15,000 for overhead charges and engineering expenses, did you? A. No, sir, because

it is not figured in there at all. It is not in those figures.

Q. It is exclusive of that? A. Yes, sir.

Q. It is to be added to that? A. Yes, sir.

Mr. Van Steenbergh: That is all, Mr. Commissioner.

Mr. Patterson: I will call Mr. Thomas.

JAMES M. THOMAS was called as a witness and, having been duly sworn, testified as follows:

425 *Direct examination by Mr. Patterson:*

Q. Mr. Thomas, what is your occupation? A. General Agent in charge of the new business department of the New York & Queens Gas Company.

Q. How long have you been in the employ of the New York & Queens Gas Company? A. About eight years, with one exception. With one little interval.

Q. An interval of how long? A. A year and a half or two years.

Q. And in the same capacity? A. Yes, sir.

Q. Do you know the total number of consumers of the New York & Queens Gas Company? A. Eighty-five hundred or thereabouts.

426 Q. How many of these consumers have gas ranges connected with the gas system? A. 85 per cent. of them.

Q. About how many has gas water heaters? A. 30 per cent. of them.

Q. About how many use gas exclusively for cooking and water heating? A. I should say about 6 per cent.

Q. State what efforts have been made in this territory to induce the use of gas for cooking and

water heating? A. We have made pretty hard campaigns to install the gas range in the kitchen; called on the builders when the building is in course of construction; even to the point of seeing them before the building is constructed, when the building is being planned, in fact, every possible effort to get them to install the gas range.

Q. Have you canvassed the entire territory that your company serves? A. Yes, sir.

Q. Are these figures the result of that canvass? A. Yes, sir; various canvasses.

Q. What has been your success in persuading consumers to use gas exclusively for cooking and water heating? A. Well, it is a very difficult proposition to get them to exclude the coal range. We have been successful, as I say, with about 6 per cent. of our entire consumers. 428

By Mr. DuBois:

Q. Sixty per cent.? A. About 6 per cent. to use the gas range exclusively. We go after the builder. We find the builder is very hard to get to take a chance on installing the gas range alone. He wants a coal range, fearing that the people would not buy his houses because he has not the coal range, and the larger houses practically give us very little consumption of gas in the kitchen; they do not seem to care about the help question; they let them have the coal range, whereas in families where the people are doing their own work, they are a little bit more willing to put in the gas range with the coal range. 429

By Mr. Patterson:

Q. Do you find it more difficult to introduce the gas range in houses which are already built than new houses? A. We find it more difficult to install in the new buildings just being built.

Q. More difficult about getting in the new buildings (addressing the reporter)? Just read the question.

(Question repeated by the reporter as follows):

"Q. Do you find it more difficult to introduce the gas range in houses which are already built than new houses?"

Mr. DuBois: And read the answer also.

(Answer repeated by the reporter as follows):

431

"A. We find it more difficult to install in the new buildings just being built."

Mr. DuBois: That is right.

Q. In these houses where the ranges and heaters are not used exclusively for cooking and heating, are you able to state during what period the gas, as a general thing, is used for cooking?

Mr. DuBois: I think that is pretty general, Mr. Commissioner—that question is not susceptible of a definite answer.

Commissioner Wood: Just repeat the question. I did not hear it.

432

(Question repeated by the reporter as above recorded.)

Commissioner Wood: I suppose you know when you sell the most gas for cooking, don't you? What period of the year?

The Witness: Yes, we know what the people tell us. They tell us they want it in the summer months.

Commissioner Wood: In the summer months?

The Witness: Yes, sir.

Mr. Patterson: That is all.

Mr. DuBois: I have no questions.

Mr. Patterson: I will ask Mr. Robinson to take the stand.

THOMAS ROBINSON was called as a witness and, have been duly sworn, testified as follows:

Direct examination by Mr. Patterson:

Mr. Patterson: I should like to offer in evidence an extract from the minutes of the Board of Estimate and Apportionment's meeting, held on December 24th, 1913, which relates to the tentative adoption of the map which was referred to by Mr. Brownson at the last hearing. 434

Mr. DuBois: I would like to know the purpose of it. I am willing to admit the facts that are in there, but I have not had time to read it over.

Mr. Patterson: The purpose is to show that this is only a tentative adoption of the map, and that there have been objections made to the map by various parties; that those objections have been postponed for a final hearing. 435

Commissioner Wood: That is an official document of the City, isn't it, and, as such, is entitled to consideration?

Mr. DuBois: I have no objection. I would rather have it spread on the minutes.

Commissioner Wood: Yes, that may be done.

Mr. Van Steenbergh: I am familiar with what took place at that hearing. There was

no objections to the location of the streets, but it was as to, for instance, the widening of Shore Drive from its present width to 70 feet or the widening of some of the other streets to a uniform width of 50 feet, not to the fact that the streets were laid out and were adopted as they appear in that connection. There was no objection made to those streets as they appear on that map.

Mr. Patterson: I think such objections as are on the record speak for themselves.

Mr. Van Steenbergh: They do. I am merely advising the Commission as to what
437 appears there.

Commissioner Wood: We want to get all the information we can on the subject. You say this is a tentative map?

Mr. Van Steenbergh: A tentative map was adopted, as appears by the record which he now offers in evidence. He speaks of certain objections. They had to do particularly with the width of those streets, not otherwise.

Mr. Patterson: I understand that is the last action which has been taken by the Board in reference to that map.

(The document offered by Mr. Patterson
438 is as follows):

"BOARD OF ESTIMATE AND APPORTIONMENT.

"Minutes of Meeting of Board of Estimate and Apportionment, held in Room 16, City Hall, Wednesday, December 24th, 1913.

"The Board met in pursuance of an adjournment.

"Present—Ardolph L. Kline, Mayor; William A. Prendergast, Comptroller; Douglas Mathewson, Deputy and Acting Comptroller; O. Grant Esterbrook, Acting President, Board of Aldermen; George McAneny, President, Borough of Manhattan; Lewis H. Pounds, President, Borough of Brooklyn; Cyrus C. Miller, President, Borough of The Bronx; Maurice E. Connolly, President, Borough of Queens and George Cromwell, President, Borough of Richmond.

"The Mayor, Hon. Ardolph L. Kline, Presided. 440

"The minutes of the meeting held December 11th, 1913, were approved as printed in the City Record, December 23rd, 1913.

* * * * * *

"Informal hearing on a tentative plan showing the street system proposed for the territory bounded approximately by the City Line, the main line of the Long Island Railroad, Springfield Road, Langdon Street, Inglewood Road, Hillside Avenue, Queens Road, North Hempstead, Turnpike, Cemetery Lane, Broadway, Whitestone Road, Crocheron Avenue, Bell Avenue, Bradish Avenue and Little Neck Bay, Borough of Queens, (Cal. No. 4). 441

"The Secretary presented affidavit of publication showing that the matter had been duly advertised.

"The Secretary then presented the following communications:

"The Long Island Railroad Company, General Office, Pennsylvania Station, New York, December 20th, 1913.

"Board of Estimate and Apportionment of the City of New York, 277 Broadway, New York City:

"Gentlemen:—We note that you will on December 24th give an informal hearing in the matter of the adoption of what is commonly known as the Bayside tentative map.

"An examination of this map indicates that the plan of the City streets contemplates an elevation of our tracks and em-
443 bankment across the Douglaston Meadows, or between old 10th and Main avenue, Douglaston, of some 15 to 18 feet. This, in the judgment of our engineers is practically an impossibility as the character of the material beneath our fill will not support this additional amount of embankment. There is from thirty to fifty feet of almost liquid mud beneath the Douglaston Meadows.

"A new street is proposed to cross the railroad tracks and property at old 4th or new 216th street. After our tracks have been depressed and pass beneath old Bell Avenue in accordance with the scheme outlined on
444 your tentative map a connection would have to be made from the depressed main line tracks to the existing freight delivery facilities at Bayside. Fourth Street, we believe, could not be carried across without a complete sacrifice of all freight handling facilities in the Bayside territory. We suggest that it would be very much more feasible to carry old 2d and old 3d streets across.

"What is designated as McKnight Drive is planned to cross beneath our main line

and yard tracks at Douglaston. It is believed this is not feasible without a substantial raise in our main line tracks across the Douglaston Meadows, which, as above stated, is impracticable.

"At Little Neck the tentative plan places Peru street largely upon our station grounds. This would destroy our freight delivery tracks, to which we could not consent.

"At 250th Street or old House Landing Road, the tentative map suggested an overhead foot bridge. Our experience indicates 446
that a foot subway is equally feasible, would be much more satisfactory and much more largely used.

"Yours very truly,

J. F. KEANY, General Solicitor.

"Long Island Sound Realty Company, 68 William street, New York, December 23rd, 1913.

"Board of Estimate and Apportionment, City Hall, New York City:

"Marathon Park, Little Neck, L. I.

"Gentlemen:—In connection with the new 447
Bayside map, you have cut up a portion of our property considerably to our disadvantage, making short lots, and are taking a large portion of it away from us; although we know that in the question of improvements personal interests must step aside, but we would like to have a few changes made in connection with the same. I have taken the matter up with the engineers of your department, and would like you to leave

Sound View Avenue as an fifty-foot street, as it terminates at the railroad track and a dead end of the street. It is parallel with Marathon Avenue, a 70-foot street, and which is now used by everybody in that section of Little Neck to go to the station as it is a natural even grade and the only even grade in this entire section. You are also going to widen Hillendale Avenue to 60 feet, taking away 10 feet of our property, so we will have two wide streets paralleling this 50-foot street, which is in the center. I would also like you to leave Prospect Place
449 50 feet wide, which is only a short street, running into a dead end at Douglaston Hills, which, between the lowlands our property and the high points, is about a 60-foot drop and in some places 10 per cent. grade, and will really only be used as a foot path for the children going to school to the top of the hill crossing the valley, as anybody going to Douglaston Hills will never go through that way. They will go by way of Broadway, which is the natural outlet. I also make this same request in connection with Clark Street, and on the easterly side of Clinton Avenue, I would like you to do
450 the entire widening on the opposite side of the street, from our property, as that is mostly City property undeveloped and irregular depths of land. Ours is laid out for 100-foot lots, and by widening the street on our side it will shorten our lot and by widening it on the other side, you would not hurt anybody.

"Yours very truly,

J. M. RIEHLE, President.

"Mr. William B. Griffiths addressed the Board concerning grade crossing on the Long Island Railroad, and Mr. William H. Van Steenbergh, Mr. John M. Riehle and Mr. Henry Wright appeared in opposition to certain features of the proposed plan. Mr. Wright requested that their objections be recorded when the final map is made.

"The President of the Borough of Queens then offered the following resolution and moved that it be adopted, with the understanding that the questions raised by the objectors will have subsequent consideration at the time when the final map is adopted: 452

"Resolved, That the Board of Estimate and Apportionment of the City of New York, after an informal hearing held on December 24th, 1913, hereby approves the tentative map bearing the signature of the President of the Borough, and dated October 20th, 1913, showing the laying out of new streets and the changes in the lines and grades of existing streets, within the territory bounded approximately by the City line, the main line of the Long Island Railroad, Springfield Road, Langdon Street, Inglewood Road, Hillside Avenue, Queens Road, North Hempstead Turnpike, Cemetery Lane, Broadway, 453 Whitestone Road, Crocheron Avenue, Bell Avenue, Bradish Avenue and Little Neck Bay, Borough of Queens.

"The motion was agreed to and the resolution was adopted by the following vote:

"Affirmative—The Mayor, the Deputy and Acting Comptroller, the Acting President of the Board of Aldermen and the Presidents of the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond—16.

"The Secretary was directed to forward copies of the communications, together with a transcript of the stenographer's notes to the President of the Borough of Queens."

Q. Have you examined the map on file with the Board of Estimate and Apportionment which is referred to in that resolution offered in evidence? A. I have.

Q. Does that map embrace the territory of Douglas Manor, Douglaston and Little Neck—in fact the territory which is covered by the blue prints offered in evidence? A. Yes, sir. It embraces all
455 the territory contained in those maps.

Mr. Patterson: That is all.

Mr. DuBois: Is that all, Mr. Patterson?

Mr. Patterson: That is all.

Mr. DuBois: I will recall Mr. Brownson.

JAMES S. BROWNSON was recalled for further examination and, having been previously sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. You have testified before in this proceeding?
456 A. Yes, sir.

Q. You testified that you are connected in some way with the Douglaston Civil Association? A. Yes, sir.

Q. You are Chairman? A. President of it; yes, sir.

Q. The question has been raised, Mr. Brownson, as to the public nature of the streets in Douglaston? A. Yes.

Q. You reside in Douglaston? A. Yes.

Q. And have lived there for a number of years? A. Five years and a half.

Q. You are familiar with the work that has been done in the streets in the last few years? A. Yes, sir.

Q. Are you able to state whether the City of New York has had any work of repairing or paving done on any of the streets in Douglaston in the last few years? A. This last summer Main avenue was repaired, rebuilt, from the railroad crossing north through Douglas Manor, going through West Drive down to within two blocks of the point.

Q. And that work was done by the City of New York? A. Yes, sir. 458

Q. And has there been any work done of oiling the streets within the last two years? A. Yes, sir.

Q. Were the streets oiled during the summer of 1913? A. Yes, sir.

Q. Was that done by the City of New York? A. To the best of my knowledge and belief it was done by the City of New York.

Q. You know it was not done by the citizens or owners of property at Douglaston? A. No, sir.

Q. Are you familiar with the procedure which is necessary in order to obtain a permit to open the streets in Douglaston? A. Yes, sir.

Q. What do you have to do? A. You have to apply to the City. 459

Q. An application is made where for that permit? A. To the Bureau of Highways.

Q. Without that you are unable to open the street? A. Yes, sir.

Q. Permits are granted by the Bureau of Highways whenever it is necessary for citizens to open a street to put in connections? A. Yes, sir.

Q. Do you know personally of such applications having been made and granted by the Bureau of Highways? A. I know of two in my own case;

460 *Schedule B—J. S. Brownson—Direct*

houses I built. I did not apply directly, but the plumber applied for that, to make connection with the water main.

Q. Water mains are maintained by the City of New York? A. Yes.

Q. In practically every street that has a house built on it in Douglaston? A. Yes, sir.

Q. As to lighting, do you know who pays for the lighting of the streets in Douglaston? A. The City of New York.

Q. The streets are lighted by electricity? A. Electricity.

Q. Practically all corners have electric lights?
461 A. Yes.

Q. Arc lights? A. No; incandescent.

Q. Do those lights run on the side streets? A. Yes, sir.

Q. And you know that? A. I was Chairman of the Grounds Committee of Douglaston Manor when those lights were put in.

Q. You applied to the City to have the lights put in? A. I did not direct; no, sir.

Q. Application was made to the City? A. Yes; application was made to the City.

Q. And the bills were paid by the City? A. Paid by the City.

Q. Are you familiar with Little Neck and Doug-
462 laston streets? A. Fairly so. I am not so familiar with Little Neck as I am with Douglaston.

Q. Do you know whether those streets have been repaired and maintained by the City of New York? A. They have been doing it; yes, sir.

Q. Do you know as to Little Neck? A. I don't know as to any specific case, but I am sure that has taken place.

Q. And that has been done for a number of years? A. Yes, sir.

Mr. DuBois: I have no further questions.

Cross examination by Mr. Patterson:

Q. You speak of certain streets in Douglas Manor being oiled in 1913? A. Yes.

Q. What streets do you refer to? A. Why, Shore Drive, West Drive, Center Drive and East Drive, and some of the cross streets. Just which ones of the cross streets were oiled, I don't know.

Q. Did you see the oiling of those streets being done? A. Why, I did, as far as I remember; yes, sir.

Q. Who was doing the oiling? A. The City, as far as I know.

Q. In what way do you know it was the City? 464
A. From what other people told me.

Q. All you know about that is hearsay? A. In 1913; yes, sir.

Q. Do you know who paid for that oiling? A. I presume the City did.

Q. You don't know, do you, who paid for it? A. I don't positively, no.

Q. You spoke of applications for permits. You said you knew of two permits? Those were with reference to your own house? A. My two houses; yes, sir.

Q. And those are on Bay Avenue? A. Bay Avenue.

Q. And when you say it is necessary to get a 465
permit to open these streets, upon what do you base that statement? A. From the fact that we had to make connection with the water main in each case, I had to pay a certain fee to the City for the privilege of opening the street to force the plumber to put the street back in its original condition.

Q. And that again was on Bay Avenue? A. Charge of $12.

Q. That was on Bay Avenue? A. Yes, sir, that was on Bay Avenue.

Q. At the corner of Bay Avenue and West Drive is there not a sign reading, "private property," or words to that effect? A. No, sir.

Q. Leading into Douglas Manor? A. The sign leading into Douglas Manor says, "Douglas Manor Inn."

Q. Is that the only sign that is there? A. That is the only one I know of.

Mr. Patterson: That is all.

Mr. DuBois: I will call Mr. Frisbie.

467

CHESTER C. FRISBIE was called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. You reside at Douglas Manor? A. No, sir, I reside in New York.

Q. You have a house in Douglas Manor that you either lease or own? A. No, sir, I am the sales manager of Douglas Park.

Q. That is a real estate company that operates in that vicinity? A. Yes, sir.

Q. And you have been connected with that com-
468 pany for a number of years? A. Yes, sir.

Q. You have heard the testimony of Mr. Brownson as to the repairs on streets and oiling being done by the City of New York? A. Yes.

Q. Have you seen the wagons and men engaged in that work, in repairing and oiling streets, during the last two or three years? A. Absolutely.

Q. And you have seen the men in uniform and with the hats and badges of the New York City departments? A. Yes, sir.

Q. Engaged in that work? A. Yes, sir.

Q. And you have ascertained that the work of oiling was done by the city or its representatives? A. Absolutely, yes, sir.

Q. In what way have you identified the oiling work as being done by the city? A. By the signs on the carts. For instance, "Third Ward, Borough of Queens, Public Department." By talking with the foreman, in fact, he went away and 200 feet were left undone and he came back the next day and finished it, after a protest.

Q. That was in 1913? A. In 1914.

Q. And the same was true in 1913? A. In 1913, no. In 1914, that is the present year, they oiled the streets. That is the first year that the city has oiled our streets. 470

Q. That is the first time that you have seen the men oiling the streets in 1914? A. Absolutely.

Q. You are speaking now of Douglas Park? A. I am speaking now of Douglas Park.

Q. In Douglas Manor, do you know whether the same teams and men operated there for the city? A. I could not say.

Cross examination by Mr. Patterson:

Q. Do you know who pays the expense of oiling the streets in Douglas Manor? A. Do I? 471

Q. Yes. A. No, sir.

Mr. Patterson: That is all.

Mr. DuBois: I will call Mr. Penn.

472 *Schedule B—R. E. Penn—Direct*

RALPH E. PENN was called as a witness and, having been duly sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. What is your business? A. I am Superintendent for Joseph P. Day, sales manager of Little Neck Hills.

Q. And Mr. Day's firm has charge of the building and development of Little Neck Hills? A. Yes, sir.

Q. Are you able to state whether the water is in the streets in Little Neck Hills? A. It is.

Q. That is the city water? A. Yes, sir.

Q. Are these streets lighted? A. They are not.

473 Q. Has the city done any work of macadamizing, repairing or oiling of the streets in Little Neck Hills? A. No, not in this development, as yet.

Q. In Douglaston you are familiar with the fact that the city has done work there? A. I saw it done about three or four weeks ago.

Q. Do you also know as to Douglas Manor? A. Only just by passing through it, that is all. I am not familiar with the conditions there.

Q. Water has been how long in the streets in Little Neck Hills? A. Two years.

Q. Do you know whether it is necessary to obtain permits to open the streets, or to use the streets in any way except passing over them, in Little Neck

474 Hills? A. It is.

Q. Those permits have to be obtained where? A. From the Bureau of Highways, Long Island City.

Q. You have obtained such permits, have you? A. Yes.

Q. You do make it a practice to obtain such a permit every time you open a street or pile lumber in a street? A. Yes, sir.

Q. That has been true for several years? A. Our development being new—it has only been opened a little over two years.

Q. And those applications for permits are made to the Bureau of Highways, Borough of Queens? A. Yes, sir.

Q. And granted by them? A. Yes, sir, granted by them.

Q. And they charge for the privilege of opening the streets? A. That depends on the roadway. If it is a macadam road it is not quite so expensive as an asphalt.

Q. A charge is made for the permit in some cases? A. A charge is made, whether it is for the permit or because of refilling that hole——

Q. The city exacts a payment? A. Yes, sir.

Q. And you have made such payments? A. I have.

Cross examination by Mr. Patterson:

Q. How many houses has your company in Little Neck Hills? A. Fifteen—fourteen.

Q. Are those completed or in process of construction? A. Ten are under course of construction, and four are completed.

Q. Upon what streets are those houses located? A. Practically all on Browvale Drive.

Q. Aren't some of them on Broadway? A. No.

Q. Some are on what is known as Lakeville Road, are they not? A. None of our houses.

Q. This Browvale Road, does that connect with Broadway? A. It does.

Q. Who built the extensions of water pipes from Broadway at the street? A. The city furnished all the water pipes and it was put in under the city's supervision.

Q. I cannot hear you. A. The city furnished all the water pipes, and they were put in under the city's supervision.

Q. Did your company pay the city for doing that work? A. We did not.

Q. Didn't your own contractor put that work in there? A. He laid it, that was all. That was our agreement with the city.

Q. The city furnished the pipe and you laid the pipe? A. We laid it. It was inspected and supervised by the city's engineer.

Q. When you say you find it necessary to get permits, upon what do you base the statement that it is necessary? A. I guess because there is a law requiring it.

Q. Did you ever look up the law? A. We have inspectors that come out there and tell us the law.

479 Q. You simply got the permits because somebody told you it was necessary to do it? A. Told by an inspector.

Mr. Patterson: That is all.

Redirect examination by Mr. DuBois:

Q. Have you a map showing the location of houses between Little Neck Hills and City Line? A. I have.

Q. And that shows actually the location of each house in the vicinity covered by the map? A. It does.

Q. Will you show me that map?

(Map produced by the witness.)

480

Q. I show you a blueprint entitled, "Map of homes, Little Neck, New York City, August 5th, 1914, R. E. Penn," and ask you whether this map shows the location of the streets, and houses on the streets, and the names of the owners or residents in the houses, in the territory lying between Douglas Manor and the City Line and the Douglaston Meadows? A. Not exactly between Douglaston Meadows —it is an imaginary line between Douglaston and Little Neck.

Q. You have shown by the dotted line the line between Douglaston and a street which is not named on the map, and the squares show the houses? A. Yes, sir.

Q. And the names on the foot of the map show the residents or owners? A. The residents.

Q. The occupants of the houses? A. Yes.

Mr. DuBois: I offer in evidence this blueprint map.

Commissioner Wood: It may be received and marked.

(The paper so offered was received in evidence and thereupon marked Exhibit No. 8 482
of this date.)

Q. There are 130 of such houses? A. 127.

Q. These houses lie in the community known as what? A. Little Neck.

Mr. DuBois: That is all.

Recross examination by Mr. Patterson:

Q. Of the 127 houses, that includes the 14? A. The 14 is included in the 127.

Q. So that at least ten of those houses are now under construction? A. Yes, sir.

Q. Are there others of the 127 which are under 483
construction? A. I don't believe that there is another house in Little Neck under construction at this time, except the school building.

Q. No building going on at present? A. Yes, there is one, too. The Snyder Apartment.

A Voice: Three store buildings, aren't there?

The Witness: Yes.

Mr. DuBois: I have no further questions. Mr. Hine, will you take the stand?

484 *Schedule B—W. F. Hine—Direct*

W. F. HINE was called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. DuBois:

Q. What is your connection with the Public Service Commission? A. Chief gas engineer.

Q. How long have you been connected with the Commission? A. Since May, 1911.

Q. And prior to your connection with the Commission, what was your employment, and where were you employed? A. I was employed by the Laclede Gas Light Company, from June, 1907, to June, 1909. At that time I was assistant to the
485 Superintendent at their largest manufacturing station.

Q. Where is the Laclede Company, in what city? A. St. Louis, Missouri.

Q. Before that what experience had you had with gas companies? A. I had no experience before that? I entered the employ of the company when I left school.

Q. Since you have been with the Commission you have had charge of the gas appraisals and gas security issues for the Commission, advising the Commission on technical matters? A. I have. I was also employed by the Laclede Gas Light Company from October, 1909, until I entered the employ of
486 the Commission, as assistant to its Chief Engineer. At that time I had charge of all the designing work, was in general charge of construction under the Chief Engineer, as to laying out and extension of mains, rebuilding of gas plants, built an electric light plant during that time, and did considerable general construction work.

Q. Since you have been connected with the Commission it has been part of your duty to keep posted as to the cost of materials, construction and labor, in the laying of gas mains and services? A. It has.

Q. Since the last session, have you, at my request, examined the testimony and exhibits introduced, especially Mr. Spear's estimate of the cost of the extension system for the purpose of furnishing Douglaston, Little Neck and Douglas Manor? A. I have.

Q. Taking the paper introduced in evidence as Exhibit No. 3, which consists of a statement of the number of feet of pipe required on certain named streets and the size of the pipe that would be required on these streets, I will ask whether, in your computation, you have used as a basis the distances and sizes of pipe stated in this Exhibit No. 3? A. I have. 488

Q. That was the basis of your examination of this distribution system? A. Yes, sir.

Q. You used that because it was not practicable, I assume, to measure up the distances and examine the locality closely in the time allowed you? A. No, it would require a great deal of detail work, and take considerable time to attempt to check off sizes and lengths. I was unable to do that.

Q. So that you assumed Mr. Spear's figures as being the scheme of distribution system that would be adopted? A. I have.

Q. You are to say that would be ample to supply not only the present, but the immediate future prospects throughout this section? A. I would say the 489 transmission line would be ample to take care of this community for a considerable time to come. The distribution mains laid through this territory would be ample to supply a great many additional houses and probably, under some little extensions from time to time, as houses were built on other streets.

Q. This is the high-pressure distribution system outlined in Exhibit No. 3? A. Yes, sir.

Q. And this exhibit calls for 15,600 feet of six-inch main? A. Yes, sir.

Q. Are you able to state whether a four-inch main would have been ample to supply not only the houses there at present, but to allow for a two or three hundred per cent increase in the number of houses? A. I think a four-inch line from the works to this territory would have been ample to supply at least three or four times the consumption that they would have with the houses there at present.

Q. Now, a six-inch main would be ample to take care of, as you say, as much as ten times the num-
491 ber of houses as at present available for service on the line? A. I would think so.

Q. Notwithstanding this large margin of excess capacity, as a gas engineer, you think it would be prudent for the company, at this time, to put in as large as a six-inch main? A. Yes, the main that is put in should provide for additional growth in other directions, and should be a continuation of the trunk-line layout throughout the territory.

Q. And such a system as Mr. Spear has outlined would cover approximately a ten times increase in the number of houses to be served? A. I would say so.

Q. Now, Mr. Hine, have you made a detailed
492 study of the cost of mains and of the approximate cost of laying and doing the different work incidental to installing such a system as is shown by Exhibit No. 3? A. I have.

Q. Now, I show you a typewritten paper entitled, "Public Service Commission, First District, estimate by W. F. Hine, Chief Gas Engineer, P. S. C. of cost of distribution system to supply Douglaston, Little Neck and Douglas Manor with gas," and I ask you whether this contains a correct statement

of the number of feet of two, three, four and six-inch mains that would be required, and the cost of such mains, at what you believe to be the present market price for the pipe? A. The feet of main required were taken from Exhibit 3, and I have estimated the cost per foot of this main, laid in place, including the overhead expenses.

Q. You have also figured on the cost of pavement, of the new compressor, the line under the creek, 332 services, the cost of installation, including engineering, supervision, contingencies and interest during construction? A. Yes, sir.

Q. Is this typewritten statement that I show you 494
the table that you have compiled as the result of your study of this question? A. It is.

Q. And that shows the total cost of installation and interest during construction as $61.004.80? A. It does.

Mr. DuBois: I offer in evidence this typewritten statement. I hand Mr. Patterson a copy for his examination.

Commissioner Wood: It may be received and marked.

(The statement so offered was received in evidence and thereupon marked Exhibit No. 9 of this date.)

Q. Mr. Hine, your figures of the total cost are 495
considerably lower than Mr. Spear's figures, but I understand that you have taken the same number of pipe and the same size pipe that Mr. Spear took? A. I have.

Q. The difference, then, I assume, lies in the different unit prices you have used for the cost of the different pipe? A. It does.

Q. Now, on a two-inch main, what do you take as your unit cost? A. 27½ cents per foot, including

ordinary contingencies, engineering and superintendence and office expenses.

Q. Do you mean by that that 27½ cents was taken as the cost of the laying and buying—that is, the buying and laying of two-inch mains? A. It would cover the entire cost of two-inch mains installed in place, ready to use.

Q. Now, what were Mr. Spear's figures for the same pipe? A. I don't recollect that.

Q. I show you Exhibit No. 3, Mr. Spear states 33,015 feet of two-inch main laid at 37 cents per foot. That is a difference of approximately 9½ cents per foot? A. Yes, sir.

497 Q. From what sources did you get the information as to the cost of this pipe? A. Why, I prepared detailed estimates of the cost of the pipe delivered on the ground, the excavation and back fill, and the labor of laying the pipe. I added to these the cost of fittings, incidentals and what I deemed as a fair amount for engineering and superintendence.

Q. What percentage did you use for engineering and superintendence? A. Five per cent.

Q. And that, in your opinion, is ample to cover the engineering and superintendence on such work as this? A. Under ordinary conditions, yes, sir.

Q. Is there anything extraordinary about the lay-
498 ing of these mains and pipes, or is it straight away gas construction work? A. There is an extraordinary condition in connection with the six-inch main, where it goes under the creek, but I have allowed $2,000 to take care of that special contingency.

Q. There is none of the other work that is anything out of the ordinary? A. No, ordinary laying.

Q. You allowed $2,000 for carrying this main under the creek? A. Yes, sir.

Q. That is double the amount Mr. Spear estimated? A. Yes.

Q. You allowed that because you think his figure is somewhat low on that? A. I think that might be low. It is very difficult to estimate what that would cost.

Q. You stated that you prepared a detailed statement dividing up the unit cost into their elements. I show you a typewritten sheet entitled, "Unit cost of mains, W. F. Hine, Chief Gas Engineer, P. S. C., Case 1856." I ask if this shows the results of your study and separation of the items making up the unit costs? A. It does. 500

Mr. DuBois: I offer this sheet in evidence.

Commissioner Wood: It may be received and marked.

(The paper so offered was received in evidence and thereupon marked Exhibit No. 10, of this date.)

Q. Referring to this Exhibit, Mr. Hine, at the top of each of the four columns, you have the figures and letters, "2-inch w. i." That means two-inch wrought iron? A. It does.

Q. And that describes the character of the main? A. Yes, sir.

Q. Then you have divided the cost into the cost of pipe and labor and laying and the excavation and back fill—that means of the trench in which the pipe is laid? A. Yes, exclusive of the pavement. 501

Q. The valves and fittings and installation and contingencies and engineering and superintendence? A. Yes.

Q. The pavement is taken care of in the other exhibit which was introduced where pavement was figured at a cost estimate of $7,900? A. It was, I took that as about a maximum figure, too.

Q. That is assuming that the system of mains is laid through macadamized streets? A. It is.

Q. And at that, you think it is at least a maximum amount? A. I think it is a maximum amount.

Q. And without a detailed study of the streets you are unable to divide that up into its exact parts? A. It would take a careful study to make a detailed estimate of that.

By Commissioner Wood:

Q. How many feet all together—what is the total distance of these mains of the extensions, do you know? A. There was about 86,000 feet of main, as
503 I remember it.

Mr. DuBois: A little more than that, I think, a little over 90,000 feet.

Commissioner Wood: Yes, about 87,000.

The Witness: 86,000 or 87,000 feet.

Mr. Patterson: 86,948.

Mr. Reihle: It is five miles from the station to Bayside, in that figure.

The Witness: Approximately that.

Q. Did you make an examination of the annual reports of this Company with a view to ascertaining what the cost of gas was by this company during the past year? A. I did.

504 Q. And what did you find reported by the company as the cost of the production of a thousand feet of gas during 1913? A. I found that the total operating expense, that includes the cost of manufacture, transportation and distribution expense, commercial expense and all general and miscellaneous expenses, was given as 72.7 cents per thousand feet.

Q. What is the price of gas as charged by the New York & Queens Gas Company, in this locality? A. $1.00.

Q. And that leaves applicable to interest on the investment and profit how much? A. 27.3 cents per thousand, which amount to a net income of $1,660 on this extension, assuming the consumption was 6,075,000 feet as estimated by the company. That seemed to me to be a reasonable estimate.

Q. Have you figured the percentage that that amount would be on the investment figured as you have figured it? A. It would be approximately 2.72 per cent.

Q. That is without figuring any increase in the number of houses or in the number of consumers, but figuring the total cost of the gas extensions, ample to supply eight or ten times the present number of houses or consumers? A. Yes, sir. 506

Mr. DuBois: That is all.

Mr. Patterson: I would like an opportunity to go over these figures before cross examining Mr. Hine.

Commissioner Wood: That is only fair, Mr. Patterson.

Mr. Reeve: Before you close, I would like to make a statement. I have sworn. Are you through, Mr. Patterson?

Mr. Patterson: I am asking for an adjournment for the purpose of cross examination, after we have had an opportunity to go over these figures. 507

Mr. DuBois: That will be satisfactory to me.

Commissioner Wood: How long an adjournment?

Mr. Patterson: I would suggest one week.

Mr. Reeve: It is getting along towards fall and towards the winter time, and if this work is to be started it should be started very quickly. The only thing I want to sug-

gest is that Commissioner Maltbie is very much opposed to long adjournments.

Commissioner Wood: Mr. Patterson, how about next Tuesday?

Mr. Patterson: I should rather have a little more time than that. I understand that Commissioner Maltbie expects to sit in the final hearing in this case somewhere between the 17th and 23d.

Commissioner Wood: I understand that Commissioner Maltbie will be back about the 1st of the month.

509 Mr. DuBois: I had simply heard rumors that he would be back about Labor Day.

Mr. Patterson: I know he has some other hearings in which Mr. Mathewson is engaged, about the 17th and 23d. In the discussion between Commissioner Maltbie and Mr. Mathewson, it was understood that the final summing up of the case would be somewhere about that time.

Commissioner Wood: How about next Wednesday.

Mr. Patterson: We can be ready next Wednesday.

Mr. Van Steenbergh: Our good friends on the other side have had numerous adjournments. 510 Next Tuesday would suit me better, particularly in view of the fact that this testimony is in the way of an explanation or criticism of their estimate they ought to have ample time to prepare for cross examination of this witness by next Tuesday.

Commissioner Wood: Won't you be here, Mr. Van Steenbergh?

Mr. Van Steenbergh: I don't know about that. Of course, I am not an indispensable

factor in this proposition. I am very much interested in it personally and otherwise, and I think we ought to progress the matter as much as we can. I don't want to impose any undue burden on my friend on the other side.

Mr. Reeve: We had a hearing set for last Thursday and the gas company got an adjournment.

Commissioner Wood: I don't think one day will make any great deal of difference, particularly as Mr. Maltbie has agreed to the final summing up in the latter part of September. 512

Mr. Patterson: Wednesday happened to be more convenient to me than Tuesday.

Mr. Van Steenbergh: We will go away with the idea that we will get through on Wednesday?

Mr. Patterson: We hope to get through on Wednesday.

Mr. Van Steenbergh: I want to put in a couple of letters. I will recall Mr. Dolittle.

JOSEPH W. DOLITTLE was called for further examination, and having been previously sworn, testified as follows: 513

Direct examination by Mr. Van Steenbergh:

Q. I will ask you to examine two letters I show you. Do you recognize those letters? (Handing papers to witness.) A. I do.

Q. Did you receive them on or about the time they bear date? A. I did.

Q. One is signed by G. Howland Leavitt, Superintendent of the Bureau of Highways, Borough of

Queens, and the other by James A. Dayton, Commissioner of Public Works of the Borough of Queens? A. Yes, sir.

Mr. Van Steenbergh: I will show them to Mr. Patterson before I introduce them.

Mr. Patterson: I have no objection.

Mr. Van Steenbergh: I offer them in evidence; counsel for the gas company makes no objection.

Mr. DuBois: They may be spread on the record?

Commissioner Wood: Yes.

515 (The letters offered by Mr. Van Steenbergh are as follows:)

"May 15, 1914.

"Mr. J. W. Doolittle,
"Douglaston Realty Company,
"Douglaston, L. I.

"Dear Sir:

"I am in receipt of your favor of the 9th inst., and in reply beg to state that I placed Alley Road or Douglaston Avenue from Broadway to Carolina Avenue; the Boulevard from Alley Road or Douglaston Avenue to its easterly end

516 on Broadway, and Princeton Road from Broadway to Virginia Road, on my list for oiling, and as soon as the oil arrives, the same will be given attention.

"Yours truly,

"G. HOWLAND LEAVITT,
"Superintendent of Highways,
"C/B Borough of Queens."

"Long Island City, May 5, 1914.

"Mr. J. W. Doolittle,
"Woolworth Building,
"New York, N. Y.

"Dear Sir:

"Your favor of the 4th instant, relative to the oiling of certain streets in Douglaston Park, was received.

"I have referred your communication to the Superintendent of Highways, with instructions to comply with your request, so far as possible.

"Very truly yours, 518

"JAMES A. DAYTON,
"JAD.F Commissioner of Public Works."

Mr. Reeve: I desire to make a statement.

F. H. REEVE was recalled for further examination, and having been previously sworn, testified as follows:

The Witness: Since the last hearing we sold a plot of land at Little Neck Hills to a party who expected to build a home, and he temporarily leased a home while they could build. The distress in not having a gas stove 519 was so distasteful to the woman that she threw up the home that she had leased, and has let the premises, although she has a year's lease, she had rather take the risk of re-letting it or paying the rent. She has moved from the property. Now, she says if she cannot have gas she will not build. We have lost a tenant, lost an occupant, and partly lost a buyer.

The second thing I want to speak of is when the poles that are put up for electric light and telephone wires, the telephone company and the electric light company have to get permits from the City of New York before they can erect poles there.

Mr. Patterson: In what territory?

The Witness: In Little Neck, City of New York. Here is a person who owns a plot and who rents a house, and she moves away bodily. We are paying tremendous taxes here, and we are trying to establish homes for people, trying to build up, construct
521 something. Without help we cannot get very far.

Mr. DuBois: The adjournment is, then, to the 2d of September, at 11.00 a. m.?

Commissioner Wood: Yes.

(Whereupon, at 12:25 p. m., the hearing in the above-entitled matter was adjourned to Wednesday, September 2, 1914, at 11:00 a. m.)

522

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

IN THE MATTER of the Hearing on Motion of the Commission, on the question of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck, in the Borough of Queens, City of New York.	Hearing Order in Case No. 1856.

524

New York City, September 2, 1914.

Met, pursuant to adjournment, at 11:00 a. m.
Before:

ROBERT C. WOOD, *Commissioner.*

Appearances:

ARTHUR DUBOIS, Esq., Assistant Counsel for the Public Service Commission for the First District. 525

MESSRS. KRAUTHOFF, HARMON & MATHEWSON, representing the New York & Queens Gas Company, by

EDWARD J. PATTERSON, Esq., of Counsel.

H. M. SPEAR, Secretary and General Manager, for the New York & Queens Gas Company.

526 *Schedule B—W. F. Hine—Cross*

F. H. REEVE, Esq., representing Mr. Joseph P. Day, Agent for the Dwight Realty Company.

JOHN M. RIEHLE, Esq., representing the Long Island Sound Realty Company.

WILLIAM VAN STEENBERGH, Esq., of Douglas Manor, appearing in person and on behalf of the Douglas Manor Association.

W. F. HINE was recalled for further examina-
527 tion, and, having been previously sworn, testified as follows:

Cross examination by Mr. Patterson:

Q. In the testimony which you gave at the last hearing I understood you to say that you based your estimates upon the maps which had been submitted here and the other exhibits? A. Yes, sir.

Q. And at that time you had not made an actual inspection of the territory covered by this application? A. I never made any detailed inspection of that particular territory.

Q. Since the last hearing have you made inspec-
528 tion of the territory to some extent? A. I have gone over the territory, yes, sir.

Q. As the result of that inspection, do you wish to revise your total estimate of the cost of installing the gas system? A. I believe the total estimate as I put it in is fair and reasonable as it was put in and as the testimony showed what was included. Everything is in detail there, what I have got in, and if anything was changed in that it would increase or decrease the cost.

Mr. DuBois: In other words, you have no revision to make of the figures you put in?

Mr. Patterson: Please let me finish my cross examination.

Q. You mean to say that on the premises on which you proceeded at the last hearing, you think your estimate was correct? A. Yes, sir.

Q. I ask you now, as the result of anything you have seen since the last hearing whether you wish to raise or lower that estimate in any way? A. I have not done anything in any detail which would allow me to change that estimate.

530

Q. How about the item of $7,900 for the replacing of the pavement; do you think that item should be increased?

Mr. DuBois: To what item of $7,900 does Mr. Patterson refer? The item of pavement, as I remember, given by Mr. Hine was the company's estimate of the cost of pavement.

Commissioner Wood: I believe Mr. Hine so stated.

Mr. DuBois: Mr. Hine so stated, and it so appears in the exhibit.

Mr. Patterson: In Exhibit 9 appears the item pavement, company's estimate, $7,900.

531

Q. After examining the pavement in that territory, do you think that that item is sufficient to cover the expense of laying the pavement or relaying the pavement?

Mr. DuBois: I do not think that is a fair question to ask Mr. Hine. Mr. Hine gave an estimate in which he took the company's figure for pavement, and put it in as such, and that is part of his total. I did not ask him

any question about pavement; I did not ask him to go out and make a detailed estimate of pavement. He simply took the company's estimate for pavement, and put it in and so stated.

Commissioner Wood: If the company made that estimate themselves, I do not see how they could question it, unless they wish to say now that it is in error.

Mr. Patterson: I wish to explain just how that estimate was based.

Mr. DuBois: Let him do it later on, then.

533 Commissioner Wood: The witness states that he took your own figures.

Mr. Patterson: But in other cases he enlarged and raised our figures, and I want to see whether this figure should stand. It is a perfectly proper question.

Mr. DuBois: It is not cross examination, and he is not your expert witness.

Commissioner Wood: We want to get all the information we can on this matter, but you stated previously what you allowed for the replacement of the pavement. Now, do you wish to state that you were mistaken?

Mr. Patterson: No, but I will explain more in detail later on what the company intended

534 to cover by this item. I also want to see what the witness, in accepting that figure, is basing his estimate on.

Commissioner Wood: The witness has stated that he took that as your figure.

Mr. Patterson: Yes.

By Commissioner Wood:

Q. Is that right, Mr. Hine? A. I stated I took that as their figure, and confirmed it somewhat by

assuming that all the mains laid would be under macadam, and all services laid would be under macadam, and on that basis I thought that that figure was substantially correct. If there was not any pavement over some of the mains that would tend to lower that figure, and if there were a more expensive type of pavement, it would tend to raise it. Just what the actual amount would be would require a survey of the pavement that each particular service and main would be under.

Q. You supposed the company had gone into that carefully and had calculated accordingly? A. I assumed that all the pavement charges were included in that figure they had in their exhibit. 536

Commissioner Wood: That answers your question, does it not, Mr. Patterson?

Mr. Patterson: I wish to ask some further questions.

Commissioner Wood: I mean that particular question.

Mr. Patterson: I do not know that it does.

By Mr. Patterson:

Q. In your testimony at the last hearing, Mr. Hine, you accepted the figure of $7,900 upon the assumption that the system of mains was laid through macadam streets, did you not? A. Yes, sir, all of them. 537

Q. As a matter of fact, are some of these mains to be laid through streets which have a bitulithic, or Belgian block, pavement? A. Yes.

Q. And would not that increase the cost of the work?

Mr. DuBois: I object to that. This witness made certain examinations and gave certain expert opinions. I never asked him to make a detailed examination of the pave-

ment, and in his examination he took the company's figures, and did not go into that point in great detail, and has not testified as to the number of feet of macadam, asphalt or Belgian block pavement, and that is not in the record, so far as I know. It is not fair now to bring out the question of pavement unless there is some proof as to the nature of the pavements to be put in.

Commissioner Wood: I should think it would depend just where in the street you put it. If you were out over on the edge of the street, there is no pavement, whereas,
539 if you get over nearer the center there is Belgian block there, but the company made that estimate——

Mr. DuBois: Mr. Hine has made no estimate on Belgian block, and I object to any testimony showing that he was in error in taking the company's figures. If their figure is in error it is for them to show it.

Mr. Patterson: I ask him on what he accepts it. If he accepts it on being all macadam, I ask him now if he knew that a large part of the extension went through Belgian block and bitulithic pavement, if he would not raise his estimate.

540 Commissioner Wood: It seems to me if you could submit a statement showing the number of feet of Belgian block and the number of feet of macadam on which you based your estimate of $7,900 that can be checked up, and it can be seen if it is a fair figure.

Mr. DuBois: I think it is for them to show that their figures are wrong, and not for our witness to show it.

Mr. Patterson: I am simply asking what he included in the estimate.

Commissioner Wood: He says he took your figures.

Mr. Patterson: He says he has done it on the assumption that it was all macadam pavement.

Commissioner Wood: I did not understand him to say so. Did you?

The Witness: I said as a rough check on that, I assumed there was macadam pavement over every foot of main and over the services in the street, and I roughly checked this figure in that manner. I assumed that some of the mains would probably not be under any pavement, and some under a more 542 expensive type, but I went into no detailed analysis, I have no data to make such an analysis.

Commissioner Wood: As a matter of fact, you have to know the locations you are going to put the mains in before you check that up, have you not?

Mr. Patterson: I suppose to the very last foot, yes, but I think it is possible to give a general estimate without doing that.

Commissioner Wood: I mean as to what portion of the road you are going to lay them in. You might be able to go through with simply dirt digging. 543

Q. In making your estimate as to the probable return to the gas company, you proceeded upon the assumption that gas would be used by every house in this territory, did you not, Mr. Hine? A. I took Mr. Spear's detail of the exact consumption that was in the company's estimate.

Q. Do you regard the annual consumption of 20,000 feet per house in Douglaston and Douglas

Manor and Douglas Park as a liberal estimate? A. I do not remember just what that estimate was based on at the moment, on what the consumption was figured at. As I understood the testimony it was stated that they had gone over the records of the consumption in their present territory and from their knowledge of the consumption of gas in territories like the one under consideration, and they estimated that the annual total sales would be 6,075,00 cubic feet per year.

Q. That was on the assumption that every house took gas, was it not? A. I believe that was.

545 Q. Now, what I was asking you particularly was whether the amount of 20,000 cubic feet per house in Douglaston and Douglas Manor and Douglas Park you would regard as a fairly liberal estimate?

Mr. DuBois: This is cross examination. The company gives us a figure themselves, and if it is wrong let them prove it by the man who gave the testimony.

Mr. Patterson: I am not trying to prove it is wrong.

Mr. DuBois: You are trying to prove the company's figures are wrong by the cross examination of our witness.

Mr. Patterson: No, I asked him if he thought it was a liberal figure.

546 Mr. DuBois: That is not cross examination.

Mr. Patterson: I can make him my own witness, for that matter.

Mr. DuBois: Not as an expert, unless you want to pay him an expert's fee.

Mr. Patterson: He is testifying with regard to these figures, and I can ask him anything with regard to them.

Mr. DuBois: Not as an expert.

Commissioner Wood: As I said before, we want to get all the information we can, but if the company puts in an estimate——

Mr. Patterson: We are not trying to recede from that.

Mr. DuBois: This witness will have to make a detailed estimate, if he is asked to testify on exact figures. He was asked to get certain information and testify on that, and he made detailed studies of those things and other things that the company put in in the exhibit he accepted rather than go into the detail work. He cannot be cross examined on the items he has not gone into detail on, because he has not testified as an expert on those matters. 548

Commissioner Wood: He has to have a basis on which to start, and he has taken the company's basis.

Mr. DuBois: Yes, and if those figures are wrong, let Mr. Patterson prove it.

Mr. Patterson: I am not contesting them. I am asking him if he does not consider that a fair estimate.

Commissioner Wood: Then the question is what?

(The question was read as above recorded.) 549

By Commissioner Wood:

Q. That is the company's estimate. Did you base that, Mr. Hine, on the company's estimate? A. I do not remember what the consumption was per house. I took their total estimated sales, and at the present moment the consumption per house is unknown to me. The consumption they figured on, I did know that. You could divide the number of

houses into the total annual sale of gas, and you would get the consumption they figured on per house.

Q. Of course, that varies in different localities, and they have stated that it was so much in this locality, and you have taken those figures? A. I just took those figures in that way.

By Mr. Patterson:

Q. Now, I ask you if you do not consider that that was a fair estimate? A. I considered that a fair estimate.

551 Q. Mr. Spear has testified that these figures were gotten up on the hypothesis that every house in this district would use gas. In your experience as a gas engineer, would you regard that as a probability?

Mr. DuBois: That again, Mr. Spear testified that every house was likely to use gas, and we had testimony by the citizens that that would be the case, and why should Mr. Hine be cross examined to show that that is not so?

Mr. Patterson: I beg pardon, Mr. Spear testified on the supposition that every house would use this amount, that this would be the return. There was testimony that in

552 Flushing and this other region where they had worked the territory most carefully, they have never been able to get more than 85 per cent to use gas. This is a mere hypothesis, assuming that every person used gas, it would be so and so.

Mr. DuBois: On the other hand, Mr. Spear's figure was based on five months' consumption, whereas the testimony was that the houses were occupied all the year round

It is unfair to cross examine Mr. Hine on Mr. Spear's testimony.

Mr. Patterson: Mr. Hine has come here as an expert, and I think I have the right to cross examine him on the whole subject. Mr. Spear gave that as a mere hypothesis, even assuming that every person in the district used gas, but he testified and Mr. Thomas testified, that was something not to be expected. I would like to have the question repeated.)

(The question was read as above recorded.)

554

Mr. DuBois: That is not cross examination in any sense of the word that I have ever understood.

Commissioner Wood: It seems to me that Mr. Hine could state that as his opinion and give his opinion as to that.

Mr. DuBois: Read the question again.

(The question was again read as above recorded.)

Mr. DuBois: I make the further objection that Mr. Spear did not testify to that effect. He testified as to consumption for five months out of the twelve, and not for the twelve months of the year, and the question directed to Mr. Hine does not correctly state Mr. 555
Spear's testimony. Now, if Mr. Hine is to be cross examined on Mr. Spear's testimony, he should at least have that testimony correctly stated to him.

Mr. Patterson: Mr. Spear testified as to the probable consumption of each house during the year, assuming that all the houses in this territory used the gas.

By Commissioner Wood:

Q. Mr. Hine, you have given an estimate of the probable consumption? A. I have.

Q. And you based that on the company's estimate, did you not? A. I did.

Q. Then you took the company's figures for that?

Mr. DuBois: And Mr. Hine has stated today that he believes that to be a fair estimate. Now, that finishes it with Mr. Hine.

Mr. Patterson: I would like to ask him this specific question, if he believes that
557 every house in that territory would use gas if gas were supplied there.

Mr. Reeve: Would not the better evidence be the people who are out there? Mr. Hine has not been out and talked with them. We can put people on the stand who have talked to these people, and who can say yes or no, and we have sworn here that 98 per cent will take gas. That is the direct evidence. This man has not talked with these people.

Mr. Patterson: I think I have the right to get testimony of this expert, and his experience in other places, as to what percentage of people would be likely to use gas.

558 Mr. DuBois: If he is to be your expert, he can only be called as such by the consent of the Commission, and by your paying him a fee. You cannot make him an expert under the guise of cross examination on things he has not testified to.

Mr. Patterson: I differ with you.

Commissioner Wood: The question gets down to whether Mr. Hine really believes that all those houses out there will take gas.

Mr. DuBois: First ask him if he knows.

Mr. Patterson: I will let him answer the question.

Mr. DuBois: If the witness can give a positive answer, yes or no——

Mr. Patterson: I object to the witness being coached.

Commissioner Wood: We do not want to shut anything out.

Mr. Patterson: No, I have not adopted that attitude. There is a great deal here that I could have objected to as hearsay and irrelevant, and everything else, but I am met with a technical objection to every question.

Commissioner Wood: I do not think so, I would not say that. The question now is that whether he believes that all those houses down there will take gas. 560

The Witness: It is not a usual experience in any new section that is piped with gas to have all of the houses use gas. I would consider that very unusual if they all did use it.

By Commissioner Wood:

Q. But they usually do in the course of time? A. Well, a certain percentage; not 100 per cent of the houses in almost any place. 561

By Mr. Patterson:

Q. In your estimate of the cost of pipe for this construction, what character of pipe did you figure on? A. I figured on what is commonly called wrought iron pipe, which is made of steel.

Q. Is there not a distinction between wrought iron pipe and steel pipe as used for gas mains? A. There is. You can buy wrought iron pipe that is

made of wrought iron or you can get wrought iron pipe that is made of steel.

Q. You figured on the steel variety, did you not? A. I have.

Q. And is that less expensive than the wrought iron type? A. That is less expensive.

Q. Is not the wrought iron pipe superior to the steel? A. Under certain conditions it would have a longer life.

Q. What are those conditions, the character of the soil? A. The character of the soil and electrolytic conditions.

563 Q. Do you know what the difference in the cost of wrought iron pipe and steel pipe would be upon this particular extension? A. I have made no computation.

Q. You stated at the last hearing, Mr. Hine, that upon the company's report the Commission had estimated the cost of gas at 72.7 cents per thousand cubic feet of gas, and that on one dollar per thousand cubic feet of gas it estimated the profit to the company at 27.3 cents. That is correct, is it not? A. I estimated the net income.

Q. In that estimate did you allow anything for the company's fixed charges in the way of interest? A. I only took the figures as stated in the annual report for 1913, showing the total operating

564 expenses.

Q. That did not include any return on borrowed money, did it, in the way of interest? A. It does not.

Q. In your estimate which you have submitted as to the total cost of this extension, have you allowed anything for a return on the general plant and equipment of the company which would be utilized in serving this territory? A. I have made no allowance for any such general return. I based the

estimate on the assumption that it would require no immediate enlargement of the generating capacity of the plant, and that this would be the return you would realize on the actual amount of money you had to spend now to supply these people.

Q. Would you not consider it fair that something should be allowed for the return upon the plant which was supplying this territory along with other territory? A. If you were going to get down to exact figures, you would have to compute the value of the plant used; you would also have to make allowance for the use that some of this system would be to the general distribution system of the 566 company at a future date. The compressor put in there will probably be needed and will be useful for purposes other than supplying gas to this particular district, and it would involve a great many detailed analyses of the operating expenses and fixed charges against the company's plant in order to arrive at this exact figure.

Q. But you would consider it fair that some return upon the company's general plant should be figured in the estimate of the return on this extension? A. In a case of this kind, I do not believe it is usual. If you wanted to arrive at the exact profit that this territory would bring to the company you would have to consider that point. You would also 567 have to eliminate any fixed charges against the capital that was expended to take care of future consumption. If you put in a six-inch main and a three-inch main would do, while it would not be good engineering to put in a three-inch main, if you wanted to get at this exact figure for any specific time you would have to eliminate that extra charge.

Q. You stated a moment ago, I think, in effect, that apparently the company's plant was able to

take care of this extension. If this extension is made, that reduces the surplus capacity of the plant, does it not? A. Yes, sir, the manufacturing plant.

Q. Yes. A. And it increases the surplus capacity of the distribution system.

Q. In your estimate of the cost of this work, have you figured on any outside engineering? A. I have included in this estimate a figure which I think would be adequate to take care of the engineering which will be required ordinarily on a job of this character. I have made a special allowance on account of the exceptional condition existing at the
569 creek.

Q. I desire that you answer my question more categorically, if you have included anything for outside engineering? A. It is all included in engineering; it is the total engineering.

Q. Have you figured anything for the city inspection upon the part of this work which would go through city streets? A. I have included what I thought was a reasonable figure in my contingencies and incidentals.

Q. Have you included anything for workmen's compensation, under the law of this state or for Employers' Liability Insurance? A. That would be an incidental expense.

570 Q. It was all included under the heading, incidentals and contingencies? A. It would be there.

Q. Have you included anything for contractor's profit on this work? A. I have made no specific addition on account of contractor's profit. I have assumed that the company would do the work, and if the company did not do the work they would probably hire a contractor who might get better prices and be able to do the work cheaper than they could.

Mr. Patterson: I think that is all.

Mr. DuBois: I have no further questions.

Mr. Patterson: I would like to ask a few questions of Mr. Spear. Are you through with your case, Mr. DuBois.

Mr. DuBois: Yes.

H. M. SPEAR was recalled for further examination, and, having been previously sworn, testified as follows:

By Mr. Patterson:

Q. In your estimate of the cost of this work, what kind of pipe did you figure on in the mains. A. 572
Strictly wrought iron.

Q. As distinguished from steel pipe? A. Yes.

Q. And do you think this is a better pipe for this particular piece of work? A. Yes, sir.

Q. I will ask you if you have received any estimate on the pipe which would be required for this work? A. Yes, I received one from the John Simmons Company.

Q. Who are the John Simmons Company? A. One of the largest jobbers of pipe and fittings in the city.

Q. (Handing paper.) Is this the estimate which you have received? A. Yes.

Mr. Patterson: I offer that in evidence. 573

Mr. DuBois: I object to that. They can get estimates as high as they like, of course. A man can figure any amount. That is not a fair way to prove the value of pipe.

Commissioner Wood: If that is simply an estimate, unless it is accompanied by other estimates, I cannot see what particular value it has.

Mr. DuBois: There is no proof that that is the lowest price which can be obtained.

Mr. Patterson: It is the current quotation on pipe.

Commissioner Wood: You do not introduce it as the current quotation on pipe, but simply as a price at which John Simmons Company is willing to supply the pipe. If there was competition Mr. Simmons might be willing to supply it cheaper.

Mr. DuBois: Lots of people would supply it at twice that price.

By Mr. Patterson:

575 Q. Do you know whether the prices quoted in this letter are current prices for pipe of this character? A. I believe they are about current. I have not had estimates from other concerns, but from the general market I think that is about the current price. And John Simmons Company told me that it was. It was a quotation they made us if we wanted to buy the pipe to-day.

Mr. Patterson: I renew my offer.

Mr. DuBois: I object to it.

Commissioner Wood: If you want to introduce it with the understanding it is not the result of competition——

Mr. Patterson: I do not claim that. I in-
576 troduce it for what it is worth.

Mr. DuBois: It is not worth anything, and I object.

Commissioner Wood: If he wants to incorporate a letter from John Simmons Company in the record I do not see any objection to it, providing it is understood that those figures are not the result of open competition.

Mr. Patterson: We do not claim it is that.

Commissioner Wood: It will be received.

(The paper referred to was received in evidence, and thereupon marked Exhibit No. 11, of this date.)

By Mr. Patterson:

Q. Mr. Spear, this letter states the prices for the various kinds of pipe with various discounts. Have you figured the net cost of the pipe as stated in this letter after the deduction of those discounts? A. Yes, sir, I have.

Q. And have you also included in this charge the item of coating the pipe? A. Yes.

Q. Would you consider the coating of the pipe a desirable thing to do? A. Yes, sir. 578

Q. Will you state what are the net costs upon the basis of this letter, included in the cost of coating? A. The two-inch is 11.1 cents per foot; the three-inch is 22.9 cents per foot; the four-inch is 32.4 cents per foot; the six-inch is 56.9 cents per foot.

Q. And on the basis of this estimate what would be the increase over Mr. Hine's figures for pipe alone? A. About $3,800.

Mr. DuBois: One second. Mr. Hine's figures, did you say?

Mr. Patterson: Yes. He has given a figure.

Mr. DuBois: You mean the figures referred to in certain exhibits? 579

Mr. Patterson: I mean the figures referred to in Exhibits 9 and 10.

Q. In your estimate Exhibit 3 there is an item, pavement, to replace $7,900. I ask you what pavement you intended to cover by this item? A. The pavement from Tenth Street, Bayside, east to the city line. Part of that is Belgian block and part

580 *Schedule B—H. M. Spear—Direct*

is bitulithic pavement, and that is the only part included in that estimate.

Q. Have you in other parts of your estimate made any allowance for the relaying of the surface of the street? A. The balance of the pavement is estimated in the price per foot of labor.

Q. In so far as this work is done through public streets, would it be necessary for the company to pay the salaries of the official inspectors appointed by the city? A. Yes.

Q. And from your experience, what inspectors are appointed in work of this character? A. One from the Department of Water Supply, Gas & Electricity, and one from the Bureau of Highways.

581

Q. And what is the usual compensation of these inspectors? A. $100 each.

Q. $100 a month? A. $100 a month.

Q. And where, if at all, do you include these items in your estimate of the cost of this work? A. In the memorandum on the bottom, which I figured would be about 30 per cent.

By Commissioner Wood:

Q. How long would the work take to do? A. I think about five months.

Q. Five months? A. Yes.

582 *By Mr. Patterson:*

Q. And have you also made any estimate of the Workmen's Compensation Insurance or General Liability Insurance which would be incurred in connection with this work? A. I included that generally, the item not being included in the estimate.

Q. In the statement Exhibit 4 there is the item fixed charges, $42,474.43; what does this refer to? A. That is the interest on our bond and unfunded debt.

Q. In making up the statement Exhibit 3, did you assume that every house in this territory would use gas? A. Yes, sir.

Q. From your experience in the Borough of Queens, do you think that this assumption is one which is likely to be fulfilled? A. No, sir, it will not. In going into a new territory on the first canvass, and for a long time to come, we never get over 60 per cent. of the houses as consumers, and then gradually, by persistent working, we increase that number; and in that number of houses there are a number of those that are vacant, but I have taken them all, so there could not be any question about not including all the houses. 584

Mr. Patterson: That is all.

Cross examination by Mr. Du Bois:

Q. Mr. Spear, have you any pipe laid in your mains and distribution systems of the type known as wrought iron but which is actually made of steel? A. Yes, sir, we have experimented somewhat with it.

By Commissioner Wood:

Q. You have done what? A. Laid some for experimental purposes. 585

By Mr. DuBois:

Q. About how many feet of it would you say that you have? A. I would say probably about five or ten thousand feet.

Q. That is all you have of that type? A. I think so.

Q. Do you know whether that type of pipe is commonly used in the City of New York? A. Not for mains, no.

Q. How about the distribution system? A. I say not for mains and services.

Q. In the two-inch size is it used? A. I do not think so, not generally.

Q. When was the last that you laid? A. We laid some of it this summer.

Q. The last pipe that you laid was this steel pipe? A. No, I say we laid some of the steel pipe this summer.

Q. About what month was that? A. I would say probably June or July.

Q. Of this year? A. Yes, sir.

Q. And that was in the vicinity of Flushing? 587 A. Yes.

Q. Near this Douglaston end of your mains? A. No.

Q. At the opposite end? A. Well, it is distributed in different parts of the territory, because our extensions have only been one hundred or two hundred feet long, most of them were short extensions.

Q. Then the extensions you made this summer were made with the steel pipe? A. Not all of them, no.

Q. Well, a number of them were? A. Yes, sir.

Q. And they have given satisfactory service so far, have they? A. Oh, naturally, they would.

Mr. DuBois: That is all.

588

By Mr. Van Steenbergh:

Q. Is it not a fact that the Consolidated Gas Company is using in this Borough at the present time in its extensions steel pipe and not wrought iron pipe? A. I do not know.

Q. Do you know anything about it at all as to what kind of pipe they are using? A. No.

Q. Do you know the difference between the life of wrought iron and steel pipe? A. Not exactly, no, but I know that——

Q. When you say not exactly, what do you mean by that? A. It depends upon the conditions of the ground. For instance, wrought iron pipe is not affected by electrolysis, anywheres near as much as steel; and we have an electrolytic condition in the Third Ward there that is extreme, particularly on this Douglaston job.

Q. Why should that be more acute there than it is anywhere else in the Borough? A. On account of the trolley going across those meadows.

Q. You would not necessarily have to follow the trolley, because the trolley is off to some distance to the south from the highway. You would follow the ordinary highway, would you not? A. Yes, but the trolley is right on the highway across the meadows. 590

Q. Only a portion of it. From the bridge on up to where you strike the hill the trolley is off to the south, but the other part of it from Bayside down to the bridge proper then it runs in the highway itself? A. From the bridge to the bottom of the hill at Douglaston is the only part which is not on the highway and that is very close to it and electrolysis will travel some distance.

Q. How far will it travel? Will it travel the distance between where the trolley is located and where you would locate these pipes? A. Yes.

Q. What is the longest distance it will travel? 591
A. I could not answer that.

Q. Why do you say it will travel that distance if you do not know? A. Because there is water there and it would travel on water and the chances are our pipe would be in the water.

Q. Suppose you laid the pipe on the north side of the highway, would it travel that distance? A. Yes; providing there is any connection across there at all, the water will carry it.

Q. If your pipes are properly coated would not that obviate that condition which might exist? A. No, sir; not the way we have figured on the coating.

Q. Would it if you did coat them properly? A. If you could put on a very expensive coat you can, yes, but it would cost you more than the mains.

Q. In the ordinary laying of gas pipe if you coated your pipes would the electrolysis exist to the same extent it would if you did not coat them properly? A. Yes, sir.

Q. It would? A. Yes, sir.

593 Q. What has been your experience in the matter of the electrolytic conditions existing, so far as they affect gas pipes? A. Right near the trolley station in Flushing on Broadway we had a six-inch main which was practically eaten up with it, nothing left of it in fact.

Q. How long had that main been installed? A. That was a cast iron main. It had been installed probably I should say 30 or 40 years. And we have other cases where we are renewing services almost continually and every two years, until we had an expert come out there and show us how to put the service in so it would not be attacked.

Q. Then if steel pipe was properly installed from the end of your service line to Bayside, Douglas-
594 ton and beyond the city line would you say that electrolysis would take place? A. Yes, sir.

Q. How long a time before the pipes would be affected and what would be the life of those pipes? A. It might be a month and might be several years depending on what the electrolytic condition is.

Q. Have you ever known of an instance where it has taken place in so short a time as one month? A. Yes.

Q. Where? A. Flushing.

Q. What part of Flushing? A. Lawrence Street, right near Broadway.

Q. What were the conditions there? A. Where our service pipe crossed the tracks of the trolley.

Q. How long a distance did they cross the trolley tracks? A. Under double track.

Q. I say for how long a distance? A. They crossed under the double track.

Q. I say what was the distance covered and how much pipe was affected? A. Possibly 20 feet.

Q. Then you would say—well, let me see how good your estimate is. How much of this length of your service pipe or your main, if conditions existed as you have described that they might exist, 596 would be affected by electrolytic conditions, that is, the existence of the trolley tracks coupled with the existence of water? A. You cannot tell where it might happen. It might happen at the end of the Douglas Manor where the electric current would leave the end of the pipe and go to the water to return to the power house.

Q. Then it is entirely speculative on your part, is it not? A. You cannot tell anything about it until you make a test.

Q. I say it is entirely speculative on your part in these instances you have given? A. No; it is founded on actual experience.

Q. But you have never had it demonstrated out 597 at Douglaston or Douglas Park? A. Not out there, no.

Q. Then the answers that you have given are of an entirely speculative character, are they not? A. No, sir; based on past experience.

Q. But not as they exist there, because you do not show where you will lay your pipes, whether on the north side of the highway— A. We cannot lay it on the north side of the highway.

Q. A part of that distance the trolley tracks do not touch the highway at all but are a considerable distance to the south. A. I have seen cast iron water mains eaten out where they are 25 feet away from the trolley tracks.

Q. Twenty-five feet then would be your limit? A. No.

Q. About? A. No.

Q. Have you ever known it to be beyond the 25 feet? A. Not personally, no.

Q. No? A. I want to correct that, I do know of cases where the ends of pipes in the water have been eaten out and they are two miles from the
599 trolley tracks.

By Commissioner Wood:

Q. That all depends on the amount of current flowing, does it not? A. And which way it is flowing.

Q. Yes; and the amount of the current? A. Yes.

Q. And the distance which it travels? A. Yes; and any current which has gone astray from the power house has got to be returned to the power house and if it is going towards the water on our pipe it will go out to the end of that pipe and come back in the water to the power house, and every
600 time it leaves the pipe is the time it is eating it.

By Mr. Van Steenbergh:

Q. It would be proper business on your part and the proper installation of those pipe to coat them, would it not? A. Yes; and we would not attempt to lay that pipe there without getting expert advice on the electrolytic condition there.

Q. You said a moment ago that your experience was that in a new territory only a certain portion

of the inhabitants or residents there used gas? A. Yes.

Q. What was that proportion again? A. 60 per cent.

Q. In this case you are aware of the testimony given here to the effect that 98 per cent. would use gas? A. I do not recall the 98 per cent. being in the testimony.

Q. Is not that substantially it, 98 per cent? A. I do not think that there was any per cent given. I think the statement was made that all the people would use gas, but you want to remember that in that number of houses there are a good many vacant houses that are included in that 332, and they 602
would not use gas.

Q. At the present time conditions are somewhat unusual so far as vacant houses are concerned, are they not, so far as the third ward is concerned? A. The number of vacant houses is unusual.

Q. Yes, it is unusual at this present time? A. No, sir; I do not think so.

Q. Do you think it is normal? A. I think it is below normal. That is, so far as our district is concerned there are fewer empty houses than there were a few years ago.

Q. I do not think you answer my question satisfactorily as to what would be the life under ordinary conditions of steel pipe as compared with 603
wrought iron pipe, strictly so-called? A. I do not think you can make any statement in regard to that at all, because you would not get the ordinary conditions.

Q. I am asking the question under ordinary conditions? A. What do you mean by ordinary conditions?

Q. Don't you understand what ordinary conditions would be? A. No, sir; not underground.

Commissioner Wood: Just what was your question, Mr. Van Steenbergh?

Mr. Van Steenbergh: I asked him, and the stenographer will repeat it, what was the difference between the life of steel pipe under ordinary conditions as compared with the use of wrought iron pipe, strictly so-called.

Commissioner Wood: Under similar conditions?

Mr. Van Steenbergh: Under ordinary conditions, what would be the difference in the life in case wrought iron pipe was used and
605 in another case where steel pipe was used, in the life of the main.

Commissioner Wood: Well, you would have to have similar conditions.

Mr. Van Steenbergh: Under ordinary conditions.

Commissioner Wood: Under similar conditions. You might have different conditions of electrolysis there.

Mr. Van Steenbergh: You might, but I am speaking under ordinary conditions, the use of the two. I think we can show that it is a fact that the Consolidated Gas Company of this city is using at the present
606 time for its extensions steel pipe preferably to the wrought iron pipe, and that for all conditions and all needs and all necessities that pipe answers the purpose.

Mr. Patterson: I think that should be the subject of testimony rather than the statement of counsel.

Mr. Van Steenbergh: I have stated. I do not want the Commission to take my statement in regard to that. I am asking him if he knows as bearing upon how much cred-

ibility ought to be given to his testimony on some of these expert matters. I do not believe he knows, myself.

Commissioner Wood: If you are going to go into electrolytic conditions, which depend upon the amount of current flowing——

Mr. Van Steenbergh: Perhaps I am very obtuse and do not make myself clear, but I am speaking about ordinary conditions as they exist.

Mr. Patterson: Do you mean without electricity?

Mr. Van Steenbergh: Ordinary conditions as they exist in New York. I am not singling out Douglas Manor or Douglaston or Queensborough or The Bronx or Manhattan, but under ordinary conditions I ask this witness to give me the difference in the two kinds of pipe as they are used. That is what I am trying to get out from him. 608

Commissioner Wood: If Mr. Spear wants to state to us what his opinion is he may do so.

The Witness: I cannot answer that question because I do not know what the conditions are. Conditions vary all over the city.

Commissioner Wood: I should imagine that. 609

By Mr. Van Steenbergh:

Q. We will let it stand in that way. Now you have attempted to give your estimate of $7900 for replacing of pavements, and I think you stated or one of the witnesses stated here, I think it was you and if I am wrong you will correct me, that starting from 10th Street, Bayside, to east of the city line, Belgian pavement existed. A. And Bitulithic.

Q. How much Belgian and how much of the other kind? A. I do not know, I did not measure it.

Q. You did not measure it? A. No, I know there is 8400 feet on 10th Street——

Q. You say you did not measure it?

Mr. Patterson: He did not say all. Let him finish.

Q. What did you measure? A. On the map from 10th Street, Bayside, to the City Line. I have not had time to go over every foot of pavement in detail in making the estimate. You cannot do it.

611 Q. You do not know what the kind and character of pavement is running from Jackson Avenue up Broadway or Main Avenue in Douglaston at the end of Douglas Manor, do you? A. I do not know exactly what the pavement is on Main Avenue, but part of that has been repaired, I do not know whether by the contractor or by the city men, but the pavement through Douglas Manor seems to be macadam all the way through. I do not think there is more than two thousand or twenty-five hundred feet all told that is not under some pavement.

Q. Then, as a matter of fact, you did not, except as you have stated it, attempt to ascertain

612 correctly as to how much was Belgian pavement and how much was asphalt or bitulithic? A. No.

Q. Another question occurs to me. What is the amount of your bonded indebtedness? A. $816,000.

Q. And your unfunded debt is how much? A. I think it is about either $40,000 or $50,000.

Q. At the present time does your company pay dividends? A. No, sir.

Q. What interest does your bonded indebtedness bear? A. Five per cent.

Q. Would you require in case of the installation of your system in the places under consideration from each householder a deposit of any amount when the meter was put in? Is that usual? A. Unless they can give us a reference to the previous lighting company, in that case we would waive it.

Q. In case that was not a satisfactory reference would you require a deposit? A. Yes.

Q. And how much? A. Equal to two months' estimated bills.

Q. You used to require a deposit of ten dollars, did you not? A. Well, we average about five or ten dollars.

614

Mr. Van Steenbergh: That is all, I think.

By Mr. Patterson:

Q. You spoke of 8400 feet of pavement of some character. I did not exactly catch it. What was it? A. That was the Belgian block and bitulithic on Broadway between 10th Street and the City Line.

Q. You do not know how much of it was Belgian block and how much was bitulithic? A. No.

Q. But you know of those two kinds there is approximately that amount of pavement? A. Yes. And another thing I did not include in that pavement charge is the crossings on the streets out 615
Broadway. We have to cross there a number of times to get to the side streets and I did not include that.

Q. The question was asked whether by coating steel pipe it could be rendered less susceptible to electrolysis, and I think you answered that it could? A. But a very expensive coat.

Q. And would the expense of coating be as much as the difference in the cost of steel and wrought iron pipe? A. It would be far more.

By Commissioner Wood:

Q. How long does that coating last? A. They have been experimenting for the last couple of years, the National Tube Company, on a special coating. I do not know exactly what the price is but it is very expensive. They wrap the pipe and tar it at the same time.

Q. That is a non-conductor? A. To some extent; yes, sir.

Q. How long does it last? A. I do not know.

By Mr. Patterson:

617 Q. Has it been thoroughly tested yet? A. I could not say. I do not think they have been experimenting on it over two years.

Mr. Patterson: I would like to ask Mr. Hine a few more questions.

W. F. HINE was recalled as a witness for further examination and, having been previously sworn, testified as follows:

By Mr. Patterson:

Q. In estimating upon the cost of pipe for this work from what did you take your figures? A. I took my figures from my knowledge of the cost of
618 so-called wrought iron or steel pipe.

Q. How recently had you looked into the cost of wrought iron and steel pipe? A. I am looking into it constantly.

Q. From what sources? A. I see a great many vouchers showing the actual costs of pipe that various companies pay in all parts of this district, and I get price lists of pipes.

Mr. Patterson: That is all.

By Mr. DuBois:

Q. Mr. Hine, referring to Exhibit 11, which is the letter from the John Simmons Company, in which certain prices are quoted for pipe, there is a price quoted for two-inch butt welded full weight strictly iron pipe of 37 cents per foot less 71.4 and 5 per cent. Do you understand what type of pipe is called for there and what the price is? A. I do.

Q. Will you explain what this less 71.4 means? A. That means that the list price is 37 cents per foot with a discount of 71.4 per cent. and an additional discount of 5 per cent. I take it to mean 620 that.

Q. And the figures given for the 3, 4, and 6-inch pipe are given in the same way? A. Yes, sir.

Q. Have you seen any quotations recently lower than these quotations for that same type of pipe? A. I do not carry in my mind the quotations I have seen. Those look to be about the average price for such pipe at the present day.

Q. Can you, before the next hearing, examine some of the figures which you have in your office and compare them with these figures which have been introduced in Exhibit No. 11? A. Yes, sir; I can.

Mr. DuBois: That is all. 621

Commissioner Wood: Have you anything further?

Mr. DuBois: I have nothing further to put in.

Commissioner Wood: Commissioner Maltbie, I understand, will be back after Labor Day. Is there anything further Mr. Patterson?

Mr. Patterson: We have nothing further.

Commissioner Wood: I presume I should declare the hearing closed if there is nothing further to submit, but it is his hearing.

Mr. DuBois: If you desire to leave it open until that date, I can have Mr. Hine check up these figures which have been introduced and it can be left to Commissioner Maltbie to state whether he wants any further evidence put in or not.

Commissioner Wood: I think I would prefer to have it done that way.

Mr. Patterson: That is entirely agreeable to us.

623 Commissioner Wood: And you can notify the other gentlemen interested, also, Mr. DuBois.

Mr. Riehle: I do not think us common people want to take up any more of our time——

Commissioner Wood: We do not want you to.

Mr. Riehle: We have spent all the time we can. We have to work hard for a living and have to pay taxes and interest and so forth, and we are not employees or attorneys of large corporations, and I think we have enough testimony here and we are willing to

624 stand on it, as far as we are all concerned, as the taxpayers of that section of the country.

Commissioner Wood: I do not think there is any desire to prolong this hearing at all, but Commissioner Maltbie has held these hearings and he will be back right after Labor Day and I do not doubt but that he will close it up.

Mr. DuBois: There will be no meeting of the Commission before Labor Day either.

Commissioner Wood: No, not until September 11th.

Mr. DuBois: So there can be no action taken until the 11th.

Mr. Riehl: It is a hardship for all of us to come here.

Commissioner Wood: I can readily realize that, and there is no desire on the part of the Commission to prolong this case.

Mr. Van Steenbergh: I understand if it goes over, it goes over to the 11th and not beyond that. 626

Commissioner Wood: No, I said Commissioner Maltbie would be back right after Labor Day and Mr. Mathewson will be back then too.

Mr. Patterson: Mr. Mathewson will not be back then. I understood Commissioner Maltbie was to set it down for hearing at some time between the 17th and 23rd.

Commissioner Wood: You probably know more about that than I do, Mr. DuBois.

Mr. DuBois: I do not know. I understood he was to be back somewhere around the 9th or 10th. I think perhaps, if an adjournment was taken until the 9th of September 627 we could close it then.

Mr. Van Steenbergh: I think it ought to be adjourned to a day certain and at the earliest possible moment.

Mr. DuBois: And the citizens can be notified if a further adjournment be taken at that time.

Commissioner Wood: We will adjourn the hearing until the 9th of September at 11.00

o'clock, and Commissioner Maltbie can then determine what course to pursue.

(Whereupon at 12.15 P. M. the hearing was adjourned to September 9th, 1914, at 11.00 A. M.)

Next Exhibit No. 12.

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

629

IN THE MATTER of the Hearing on Motion of the Commission on the question of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent as may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.	Hearing Order in Case No. 1856.

630

New York, September 9th, 1914.

Met pursuant to adjournment at 11.00 A. M. Before: ROBERT C. WOOD, *Commissioner.*

Appearances:

H. M. CHAMBERLAIN, Esq., Assistant Counsel for the Public Service Commission for the First District.

JAMES S. BROWNSON, Esq., Chairman of the Douglaston Civic Association.

F. H. REEVE, Esq., representing Mr. Joseph P. Day, Agent for the Dwight Murray Realty Company.

MESSRS. KRAUTHOFF, HARMON & MATHEWSON, representing the New York & Queens Gas Company, by

EDWARD J. PATTERSON, Esq., of Counsel.

WILLIAM H. VAN STEENBERGH, Esq., a resident of the District, appearing in person. 632

Commissioner Wood: Commissioner Maltbie has not returned as yet?

Mr. Chamberlain: No, Mr. Commissioner.

Commissioner Wood: His sceretary told me yesterday he was expected the latter part of this week or the beginning of next. I think we have done all we can during his absence.

Mr. Patterson: It seems so to me.

Mr. Van Steenbergh: So far as we are concerned we are ready to close it up to-day and submit any oral argument or arrange for the submission of briefs later on. This delay, of course, is rather embarrassing to the petitioners here. Does your Honor believe that we should not close it up before Commissioner Maltbie returns or will you listen to argument? 633

Commissioner Wood: I had rather have you do that before Commissioner Maltbie. It is his hearing and I simply took it at his

request. The Commission has expedited this matter as much as possible. As you know, during August there are very few City Departments in session, and I think we have expedited it as much as possible. Now, the Commissioner will be back the early part of next week certainly.

Mr. Van Steenbergh: You don't know definitely as to whether or not he will be back Monday?

Commissioner Wood: I only know what his secretary told me. He may be back today, but if not, he will be back the early
635 part of next week.

Mr. Van Steenbergh: The reason I ask that is for a personal reason. I have got a will case at Kingston, New York, which is set down peremptorily for Tuesday morning. I wanted to arrange to get away Monday afternoon. I told Mr. Patterson it would be agreeable to me to argue this Monday morning. Of course, if the Commissioner is not to be here, there is no use of setting it down for that day.

Mr. Patterson: I will be ready to take it up at any time.

Mr. Van Steenbergh: We have no further
636 proof so far as we are concerned.

Commissioner Wood: Could we not leave it subject to the call of the Chair and Mr. Chamberlain advise you as soon as the Commissioner gets back?

Mr. Chamberlain: That would be a very good arrangement, I think.

Mr. Patterson: Mr. Chamberlain, have you any more to put in?

Mr. Chamberlain: I think not.

Mr. Patterson: That is true as far as you are concerned, Mr. Van Steenbergh?

Mr. Van Steenbergh: Yes.

Commissioner Wood: Did Mr. DuBois want to check up that Simmons' price on pipe?

Mr. Chamberlain: There might be something on that. That has not been checked up the last I knew of it.

Commissioner Wood: That is not a very important matter. Suppose we leave it that way. We will adjourn subject to the call of the Chair, and as soon as Commissioner Maltbie comes back Mr. Chamberlain will 638 get in communication with you.

Mr. Patterson: That is satisfactory to me.

Mr. Van Steenbergh: That is with the understanding that it will be set down at the earliest date, except on the 15th and 16th I shall not be able to be here.

Commissioner Wood: I have no doubt it can be arranged so it will not come off on the 15th or 16th. That is next Tuesday and Wednesday.

(Whereupon at 11.05 A. M. the hearing in the above-entitled matter was adjourned subject to the call of the Commission.)

639

640 *Schedule B—Proceedings*

STATE OF NEW YORK,

PUBLIC SERVICE COMMISSION—FIRST DISTRICT.

IN THE MATTER of the Hearing on Motion of the Commission, on the question of the extension of the gas mains of NEW YORK & QUEENS GAS COMPANY to such extent as 641 may be necessary to serve residents of Douglaston and Little Neck in the Borough of Queens, City of New York.	Hearing Order in Case No. 1856.

New York, October 6th, 1914.

Before: MILO R. MALTBIE, *Commissioner*.

Met pursuant to adjournment at 3.30 P. M.

Appearances:

ARTHUR DUBOIS, Esq., Assistant Counsel for the Public Service Commission for
642 the First District.

Messrs. KRAUTHOFF, HARMON & MATHEWSON, representing the New York & Queens Gas Company, by

CHARLES F. MATHEWSON, Esq., and

EDWARD J. PATTERSON, Esq., of Counsel.

WILLIAM H. VAN STEENBERGH, Esq., a resident of the District, appearing in person.

Commissioner Maltbie: I believe there is nothing further, in the way of evidence, to be put in to-day.

Mr. Patterson: Mr. Commissioner, I want to offer in evidence a letter written by the Douglaston Civic Association in answer to a letter which is in evidence. I had assumed that this letter was in evidence, but on going through the minutes I find that it was not put in.

Commissioner Maltbie: It may be received and spread upon the record.

(The letter referred to is as follows):

644

"DOUGLASTON CIVIC ASSOCIATION

Douglaston, N. Y., June 26, 1914.

M. H. Spear, Esq., Secy.,
New York and Queens Gas Co.,
Flushing, L. I.

Dear Mr. Spear,

I am very much disappointed to read the contents of your favor of the 24th instant, in which you state it will be impossible to give Douglaston and Little Neck gas, unless we assist you financially in laying the mains and doing the other necessary work.

I have informed you on several occasions, 645
that it will be impossible for us to put up any money to assist a public service corporation in what I consider its duty to the public. The people give you a valuable franchise, and I demand that the residents in this community be considered in this matter.

As far as your figure goes, showing the net return on the capital invested, I cannot help

but feel that you have made an error in your figures, as the maps have been carefully scrutinized by one amply competent in this matter, and his figure is far in excess of yours. I cannot consider any proposition but installing this improvement at an early date. I shall apply to the Public Service Commission for a hearing at once.

Yours very truly,

DOUGLASTON CIVIC ASSOCIATION,
(Signed) J. S. Brownson,
President."

647

Commissioner Maltbie: Is there anything further to offer in the way of evidence?

Mr. Patterson: We have nothing further to offer.

Commissioner Maltbie: Have the complainants anything to offer?

Mr. Van Steenbergh: No, sir, we have nothing further to offer.

Commissioner Maltbie: Which one of you will be heard first?

Mr. Van Steenbergh: If the Commissioner please, I am only of counsel in this case. Mr. DuBois, who represents the Commission here, has been conducting this examination,

648

and I have only assisted in it, so far as I was able to do so. I am, however, prepared to present the matter on behalf of the petitioners; but I feel that he ought to be considered, and probably should be heard before I am heard.

Commissioner Maltbie: It is not customary for counsel for the Commission to make extended argument in any case. He keeps

track of a case largely for the purpose of seeing that the record is complete, and that the necessary facts are in, and things of that sort. If you wish to be heard now, I will hear you first.

ARGUMENT OF WILLIAM H. VAN STEENBERGH.

Mr. Commissioner, I appear as counsel, as stated at one of the earlier hearings, for the Douglas Manor Association, and also as one of the Committee of the Douglaston Civic Association. I might say that the 650
Douglas Manor Association, of which I am a trustee, owns property along the Shore Road, so called. It owns various pieces of property in the manor itself. The Douglaston Civic Association is made up of residents both of Douglas Manor and of Douglaston, and its membership numbers 115.

The organization of this Association, I said some time ago, grew out of the fact that these gentlemen are residents and taxpayers at Douglaston, Douglaston Park and Douglas Manor, and they are interested in everything which pertains to the advantage and benefit of this community in their respective residential sections. 651

This matter, as I understand it, however, comes before the Commission on the petition of the Douglaston Civic Association. They are asking the Gas Company, which is now supplying gas in the City of Flushing, and in various parts of the Third Ward of the Borough of Queens, to extend their mains, or rather they ask that this company be directed by order of this Commission to extend

their mains so as to provide and supply gas for illuminating and cooking purposes to the residents of Douglas Park, Douglaston proper, Little Neck, and Douglas Manor itself.

You have listened to the evidence which has been given in support of this petition or application. The respondents do not object to or resist this application, as I apprehend it, upon the ground that convenience and necessity do not exist; but they resist it upon the ground that, as a matter of fact, the cost of installing the system, or
653 of extending this main from the end of their present conduits would be excessive, and further, that the income or revenue return upon the company's investment would not be adequate. These, in short, are the main and substantial objections made by the respondents, and form the basis of the opposition to this application.

In support of the application of the complainants, we have produced here our evidence.

We have had the President of the Douglaston Civic Association upon the stand. He has been examined and cross examined, and
654 he has given you the data and statistics going to show the probable consumption of gas in Douglaston and Douglas Manor. In addition to that you have had the testimony of Mr. Dolittle, of the Douglaston Realty Company, who has sworn that there are already 25 houses erected there; that they own 1,000 lots, and that every person, so far as he has been able to ascertain, would use gas for cooking purposes; and, further, in this particular development, the houses were occupied and enjoyed by residents who lived

there the year round. His testimony also was that the number of houses had doubled in the last year, and that the average house would consume from 2,500 to 3,000 cubic feet of gas per month.

In addition to that, Mr. Riehle, who was connected with the Long Island Sound Realty Company, testified that the company was the owner of 800 lots, and that they had lost the sale of two houses, due to the fact that they had no gas and were not able to furnish it; that all of the residents in that particular development would use gas in 656
their houses for both cooking and, partially, for illuminating purposes, and would use it the year round.

Mr. Reeve, who represents the Little Neck Hills proposition, testified that they were the owners of 200 acres of land in that vicinity, and that 1,000 lots were developed and in the course of being developed; that they already had four finished houses and ten in course of erection. He testified, substantially, to the fact that the residents in that particular development would use gas for cooking purposes.

I might say that this statement applies to all of the witnesses who have been produced 657
here in support of the petitioner's application, and the reason for making these statements that these parties would use gas for cooking purposes, was that they have talked with these people and for that reason know they would use the gas the year round. That, of course, is the best evidence you can get in that respect.

In addition to that, there is a petition which is in evidence, signed by the residents

of these particular localities, promising and agreeing that they would use gas for cooking purposes.

I respectfully submit that I need not spend very much of the time of the Commission in discussing the question of necessity. It does seem to me that if there ever was a case where the necessity exists, it exists here. Here you have a development which has not only rapidly developed within the last two or three years, but is now developing. In my own particular locality, there are at least seven houses in the process of construction,
659 and the owners of four of them have commenced the erection of these houses since this hearing was commenced in July. It would seem to me that they ought to be entitled to have this Queens County Gas Company supply them with gas.

I now want to say a word on the legal side of this matter, and the question comes up as to what the courts have said in regard to it. The Appellate Division, in the recent case of the People of the State of New York upon the relation of C. Perceval, a corporation, relator, versus the Public Service Commission for the First District, and Edward
660 E. McCall, et al., as Commissioners thereof, and the New York Edison Company, respondents, which came before the court upon a writ of certiorari to review the action of the Public Service Commission, in an opinion delivered by Mr. Justice Scott, said:

"The Edison Company is a public service corporation, holding a franchise from the State, and enjoying by reason of its public character, certain valuable privileges not

usually accorded to a private individual or a corporation for its own individual benefit, not the least of which is the right to use the public streets and highways for carrying its conduits. Having undertaken to perform a public service and accepted special privileges in consideration of such undertaking, it is bound to serve impartially every member of the community which demands its service and stands ready to pay therefor and to comply with proper and reasonable regulations respecting such service."

The Court cites the case of Gibbs versus Baltimore Gas Company, 130 U. S. 396; 662
Central New York Telephone & Telegraph Company versus Averill, 199 N. Y. 128.

The Court then further says:

"Not only is the company under this obligation at common law, but it is expressly required by statute to furnish electricity for lighting upon the application of the occupants of any building or premises within 100 feet of its main or wire, as it is conceded that relator's premises are."

Of course, this case is not on all fours with the proposition at bar, because the Edison Company there had its wires within the distance prescribed by the statute, and the 663
applicant made application for electricity to be furnished to him.

In addition to the testimony to which I have already called attention, your Honor will recall the appearance here of a number of the residents of this particular locality, who are heart and soul back of this proposition. They are in earnest about this matter. I have never known of an application where the parties were more in earnest.

They really mean what they say; they mean what they claim, and what they insist upon. This means, to this locality, more than I can state, and more than any of the witnesses can testify to, in the line of health and convenience to the residents of this section. This is not a dead section. This is a growing section.

I have represented a gas company in the past, and it has always been our policy, if we saw good business, to go after it, but in this case the company says that it will cost a certain number of thousand dollars, and
665 that, on such an outlay, it will only return to them, on five months' consumption, 2½ per cent on the outlay.

I respectfully submit, in answer to that proposition, that the Engineer of this Commission was sworn and gave his testimony. I need not comment very much upon that, except to call attention to his figures as to the cost of putting in the two-inch, three-inch and four-inch mains——

Commissioner Maltbie: It is unnecessary to give the details of that.

Mr. Van Steenbergh: His total is $61,004.08. I do not think our friends have
666 successfully challenged that estimate as to accuracy.

I forgot to mention one matter, to which I desire to call your attention, and that is the fact that wherever gas mains are installed, there are electrolytic conditions existing, and that electrolysis will take place. Your Honor must be familiar with the lay of the land there. The trolley tracks come to the top of the hill and run along to the

south and across the meadows, and then turn off from the roadway. In good practise what ought to be done would be to put this main on the north side of the roadway, and then, I am very certain, from the examination that I have made and from information I have had given by those who are capable to advise in matters of that kind, there would be very little danger of electrolysis and if there should be any danger from that cause, they are now able to provide a coating for their mains, so that water will not affect them, and electrolysis will not take place. Therefore, so far as any danger from 668
the proximity of the rails of the trolley tracks is concerned, it is a very minus quantity.

Now, these gentlemen, it seems to me, have made a very unusual and extraordinary proposition. I do not know whether they mean it or not, or whether it was done merely for the purpose of making a record here; but they have said to these consumers, "Yes, we will give you gas, but you must put up $10,000."

It seems to me, as a practical proposition, and I must so submit it to your Honor, that such a proposition as that was utterly un- 669
called for, because this body of taxpayers and residents within the Third Ward of the Borough of Queens, are entitled to certain rights and privileges given to them by the statute of this state, and that statute does not say that those rights and privileges are predicated upon any conditions, except those of convenience and necessity. Why, then, should this company say to these gentlemen,

"If you will put up $10,000, we will extend these mains." This was not the case of a lot of people coming to a corporation that had no money, and had no plant, and saying, "We will enter into an agreement with you that if you will put up so much cash we will furnish you the gas."

I submit that is not this proposition. I am surprised that this company should have suggested to these residents that they should put up $10,000 in cash. If they combat this proposition fairly and squarely, on the question of convenience, of necessity and of
671 return upon their investment, then I say that is a proposition we have met and have successfully met.

Now, in addition to the cases cited by me a moment ago, when I read from the decision of the Appellate Division, I want to read from an opinion of Mr. Commissioner Maltbie in the case of the New York & Queens County Railroad Company, which answers a question made by my distinguished adversary, when he put in some proof, incidentally, that these streets in Douglas Manor, had not been formally accepted by the City, and that there were certain insurmountable difficulties present. I submit that the evidence
672 overwhelmingly shows that, for a great length of time, these streets have been used as public streets; that the City has recognized them as such; that it has done work upon them, has oiled them and surfaced them, and therefore that the City does today, by way of demonstrating its recognition of the streets as public streets.

Commissioner Maltbie says in this case:

"It has been suggested that the street is not graded and paved, and not in first-class condition. But street railroads have been constructed and operated in many streets and highways that were not paved and graded. Another reason offered is that it would cost the company a considerable sum of money to put down the tracks. Assuming that to be so, it is no excuse. When the company accepted its franchise, it must, of course, have taken into account the fact that it would have to spend money to build the road. Another reason given is that the section of the road unconstructed would not 674
pay. But a railroad company which accepts a franchise for a line through a territory not fully built up, ought to take into account this consideration, and, if it does not wish to live up to the contract made by the City, it should not accept such contract. It may not pick and choose afterwards; it must take the lean with the fat."

Now, there is the gist of this entire matter. Here is a company enjoying special privileges and enjoying a franchise which gives to it the privilege to do certain things which an individual cannot do. It has a main completed up to a certain point, and 675
all it has to do is to extend that main. I do not believe, and I say it with all due deference to my friends on the other side, that it would be necessary for them to construct an entirely new main from Broadway, Flushing, to Douglaston and Little Neck. I think they can get a high-pressure service there which will meet the requirements as they exist in that particular territory; and that, if they

want to do it, if they want to meet this opposition in good faith, that they can extend their main as it now exists, and it will supply that community for a considerable length of time with such service as is necessary, and with adequate service for a long period of time, without running an entirely new high-pressure main from the Broadway, Flushing station.

It seems to me that these petitioners have met all of the requirements of the situation, as it confronts us here. They have shown convenience. They have shown necessity.
677 They have shown that the cost is not excessive. They have demonstrated, I contend, that there will be a fair return upon the investment, and that this will be an all-the-year-around proposition. They have shown that the consumption will increase instead of diminish. In fact, in this case we have made one of the strongest cases that has ever been brought to my attention, of convenience and necessity, and have shown the strongest of reasons why this Commission, by its order, should require this company to grant the request of the petitioners.

I do not know that I need to say any-
678 thing more, except to ask that I may be permitted to answer the other side, in case I see fit to do so.

ARGUMENT OF EDWARD J. PATTERSON.

Mr. Patterson: Mr. Commissioner, I appear for the New York & Queens Gas Company, which Mr. Van Steenbergh has pic-

tured as a somewhat unreasonable corporation.

Of course, the primary desire of this company is to make money, and to earn dividends for its stockholders, and if we saw an opportunity of a reasonable return upon the investment, within a reasonable time, by making this extension into this territory, it goes without saying we would be very glad to grasp the opportunity of going into it.

The fundamental principle which I think is involved in this case, is one which your Honor laid down in the case of the Woodhaven Gas Light Company on the application to require it to extend its mains to serve citizens of Aqueduct. In that case 680 the language which your Honor used was:

"In the matter of extension of mains, the obligation upon the company is an obligation to furnish reasonable service, all things being considered. There must be the prospect of a renumerative service within a reasonable time."

We claim that condition does not exist in this case. At the present time the mains of the New York & Queens Gas Company come as far as Bayside on the west of Alley Creek, and in between that and the territory 681 to be served is the creek and some low lying land, so that this territory is isolated from the rest of the Third Ward in the Borough of Queens. Little Neck is on a body of water, and the mains come around to the north of Douglaston and then, continuing, come to the City line. That is as far as we can go under our franchise. This territory is in the extreme limit of our territory under

the franchise. There is no other community which can help us divide the cost of making this extension.

We have no need to enlarge our mains to serve any territory that we are now serving. We have a low-pressure system going to Bayside, and that is sufficient to carry and take care of the present needs of Bayside and the reasonable growth of that particular locality. If it were possible to extend that low-pressure system, it would mean that we would have to deprive the Bayside side of this territory of a supply, and
683 later on we would have to consider additional facilities in Bayside, which would be paying for the gas supply to the residents of these localities. It is not possible to extend our present low-pressure system to this territory, because it is not adequate for the purpose.

When this matter was first discussed, Douglaston and Douglas Manor alone were suggested as the territory to be supplied, and some figures were submitted upon the possibilities of extending the present system; but for the territory covered by this application, our system at present is utterly inad-
684 equate.

This territory lies six and one-half miles from our gas works, and we have got to go part of the way with a six-inch main and part of the way with a four-inch main, to serve the territory. Mr. Spear has gone into a careful detailed estimate of this work, and the necessity for it. Mr. Hine has gone over his figures, and has not seen fit to dispute the accuracy of them or the necessity for this

system which Mr. Spear proposes to install; but, on the contrary, he has raised some of the estimates of Mr. Spear.

There is an exceptional difficulty in going under the creek, and Mr. Hine himself considers that there are exceptional difficulties in that case, and, therefore, has doubled our estimate for the cost of going under that creek.

Mr. Spear's estimate of the actual cost of making this extension, including 350 services, that being the total number of houses in this district, was $66,731. To that cost Mr. Spear has added engineering and overhead charges, interest during construction, employer's liability, taxes, and various other items, 30 per cent, making a total of $86,731.60. Mr. Hine's estimate is, in round numbers, $61,000. By eliminating this 30 per cent which Mr. Spear has allowed, there is a difference in the estimates of only four or five thousand dollars, and that difference is easily accounted for. Mr. Spear has figured throughout on wrought iron pipe, because it is necessary that this main shall run parallel with the trolley lines, and there are electrolytic conditions existing there; and, as Mr. Hine has admitted, wrought iron pipe would last longer under these conditions. That alone makes a difference of $2,800. A very long cross-examination by my friend here entirely failed to shake Mr. Spear's testimony as to the necessity of putting in this high grade of pipe. 686 687

That brings the difference between the two estimates down to about $2,500, exclusive of this allowance of 30 per cent. Mr. Hine

makes an allowance of a scant 10 per cent upon a part of the work.

Commissioner Maltbie: For what?

Mr. Patterson: Upon the cost of mains, and covering, as he says, engineering expenses, incidentals and contingencies. He stated that he increased the expense of going under the creek on Mr. Spear's figure from $1,000 to $2,000 to take care of any exceptional circumstances that might be met with there.

He exhibits here figures as to the cost of relaying pavement, the cost of the services,
689 and he increases our figure as to cost of compressor. He makes no allowance for general charges, interest or taxes, or for these other items enumerated.

Commisioner Maltbie: You will not be taxed anything until you get it completed.

Mr. Patterson: That probably is a small item; but the other items amount to considerable.

Commissioner Maltbie: Interest will not be over two per cent.

Mr. Patterson: Interest comes to $601 on Mr. Hine's estimate, and a little over that on our estimate.

690 Now, as bearing on what is a proper allowance, I want to refer to one or two decisions by this Commission.

Take first the case of the Queens Borough Gas & Electric Company, decided by this Commission in Volume 1, Public Service Report, page 570, where the Commission finds that the allowance to be made with respect to mains is 23.4 per cent, and on general work it is 19.25 per cent.

In the case of Mayhew vs. the Kings County Lighting Company (page 682) the allowance made with respect to mains was 26½ per cent, and on general work 21.8 per cent.

In the case of Balks vs. the Brooklyn Borough Gas Company (page 640), the allowance made on mains was 26.5 per cent, and on general work 22.6 per cent.

So that, on the basis of these precedents, I think Mr. Spear's allowances of 30 per cent comes nearer to the fact than Mr. Hine's, which is only a scant 10 per cent.

Commissioner Maltbie: Is this company going to do this work itself? 692

Mr. Patterson: We hope we will not have to do it at all; but if we do, I think probably it will be necessary to contract for it, as the company has not the organization or force to do the work of this character. There are about 19 miles of main to be laid, and that means an addition of 19 or 20 per cent to the total mains of the company at the present time, and the company has not either the engineering organization or the construction organization to do work of this kind. If it is done by somebody else, there is the element of contractor's profit to be added, which must be taken into account. 693

Commissioner Maltbie: If it is done by a general contractor it will be done for less than your figures.

Mr. Patterson: I have pointed out the slight difference between Mr. Hine's estimate and our estimate, and when the element of the contractor's profit is taken into account, I think the cost will exceed what we could do it for ourselves, if we had the organization.

Coming now to the question of return, upon the basis of these two estimates, it appears from the evidence that, according to the returns filed by the company with the Commission for the calendar year 1913, the net return to the company was 27.3 cents per thousand cubic feet of gas sold. That appears in Mr. Hine's analysis of the figures, and also in the statement submitted by Mr. Spear, if you eliminate the item of fixed charges.

Now, assuming that every house in this territory used gas for fuel purposes—and it
695 is conceded that there would be practically no use of it for illuminating purposes, because electricity has already been introduced into this territory—the net return to us would be $1,660.

Commissioner Maltbie: How much consumption do you assume for each house?

Mr. Patterson: We assume 20,000 cubic feet for Douglaston and Douglas Manor.

Commissioner Maltbie: How much per house?

Mr. Patterson: 20,000 cubic feet per year for each house in Douglaston and Douglas Manor, and 15,000 cubic feet per year for
696 each house in Little Neck.

Commissioner Maltbie: Do you estimate that for the whole year's consumption?

Mr. Patterson: Yes, sir; we allow a year's consumption. Of course, the probability is that gas would not be used for fuel to any large extent, except during perhaps five months of the year.

Commissioner Maltbie: As fuel for what?

Mr. Patterson: For cooking and heating.

Our experience is that only six per cent of our customers use gas for fuel exclusively.

Commissioner Maltbie: Suppose they just use it for cooking; that would amount to how much for the entire area?

Mr. Patterson: It comes to a total of 6,075,000 feet.

Commissioner Maltbie: They would consume about 1,600 cubic feet per month in one place, and about 1,250 cubic feet in the other, per month.

Mr. Patterson: I have given you the average by the year.

698 Commissioner Maltbie: You cannot run much of a cooking range on that amount of gas.

Mr. Patterson: But the fact is that it is not used throughout the year.

Commissioner Maltbie: A good many of these houses are kept open the year around.

Mr. Patterson: There is no question about that, but the gas is not used the year around. We know what our experience is right in that same territory, and we know that this is the average consumption for fuel purposes.

Commissioner Maltbie: If it is used only half of the year, it would amount to about 699 3,200 feet in one case, and about 2,500 feet in the other, and that would not supply very much of a family.

Mr. Patterson: Mr. Spear says that we have a great many accounts which run $1.25 a month.

Commissioner Maltbie: That is true, and it is true of Manhattan also; but it is a very small stove that gets down to a consumption

of $1.25 a month, when it is used for cooking.

Mr. Patterson: In most of these cases gas is not used exclusively, but is used as an auxiliary.

Commissioner Maltbie: With what—with coal?

Mr. Patterson: With coal, yes.

Commissioner Maltbie: Do you seriously think that in the grade of houses which exist out there, if they had gas in the kitchen they could do all their cooking on $1.60 a month or $1.25 a month, and that, if that
701 is the case, anybody would use coal for running a stove in the kitchen?

Mr. Patterson: No, I do not say that; but, as a matter of fact, they do not use it to do all their cooking, and therefore the amount of gas they use is only the figure I have given.

Commissioner Maltbie: Do you mean to say that if they could get their cooking done for $3.00 a month even, that they would use coal out there?

Mr. Patterson: I think they would, a part of the time.

Commissioner Maltbie: In that particular
702 locality and houses of that kind?

Mr. Patterson: Mr. Spear, of course, can answer those questions better than I can.

Mr. Reeve: I want to interrupt for a minute to say that I can answer the question, that in our vicinity we would not use coal for a minute if we could get gas.

Commissioner Maltbie: If they use coal they have got to have two stoves.

Mr. Spear: You want to realize that in order to get a man to change from coal to

gas, he has got to put additional heat into his kitchen, and we have some of our strongest fights, to get people to do away with their coal ranges at the present time. For five or six years we have been making this fight, and we have got six per cent of our consumers to throw out coal ranges.

Commissioner Maltbie: This is a high average community for that section. This is a community of pretty high-class houses.

Mr. Spear: Yes, except in Little Neck. But, as a matter of fact, in very large houses we get a smaller consumption than we do from the intermediate grade of house, where 704 a woman has one servant and watches the kitchen. In the large houses they care nothing about it.

Commissioner Maltbie: My experience has been that the servants will waste gas alright. The most economical place, in the consumption of gas, is the place where the wife does her own work.

Mr. Reeve: I do not want to break into the argument of this gentleman except to say that we are now ready to take out the coal ranges and immediately put in gas, as soon as gas can be installed. Since our last hearing we have lost three sales on account 705 of having no gas.

Mr. Patterson: I can only state that it appears from the testimony that these are the average figures of consumption.

Commissioner Maltbie: What is your total consumption there?

Mr. Patterson: You mean in the entire ward?

Commissioner Maltbie: Yes, in the entire area?

Mr. Patterson: In the entire area it is 6,075,000 cubic feet.

Commissioner Maltbie: And that was built up on the basis of 15,000 to 20,000 cubic feet consumption per house per year?

Mr. Patterson: Yes.

Commissioner Maltbie: For how many houses?

Mr. Patterson: For 332 houses.

Mr. Van Steenbergh: As a matter of fact that is an error. The total number of houses is 411.

707 Commissioner Maltbie: They figured on 332.

Mr. Patterson: We made an actual count of the houses in Little Neck, which resulted in this difference, and we figured on 332 houses.

Commissioner Maltbie: How much do you estimate would be the net income from 6,000,000 feet of gas?

Mr. Patterson: $1,660.

Commissioner Maltbie: That is net?

Mr. Patterson: Yes.

Commissioner Maltbie: And you figure that to be what per cent on your investment?

708 Mr. Patterson: On the basis of our figures it is a net return of 1.9 per cent, and on the basis of Mr. Hine's figures it is 2.7 per cent. That is on the assumption that every house in this territory uses gas, and that, I think, is an assumption that will not be borne out by the facts.

Commissioner Maltbie: The statement was made here just a moment ago that there were 411 houses there.

Mr. Patterson: There is a mistake in the figures regarding Little Neck. We found only 113 houses there, instead of 187.

Mr. Spear: That is by actual count of the houses, and some of them are vacant.

Mr. Patterson: At the present time it is not at all likely that 332 of them would take gas.

Commissioner Maltbie: If you double the consumption on Mr. Hine's figures, you would have over 5 per cent.

Mr. Patterson: Yes; but our experience in other territories is that for some time after the gas is installed, you cannot get more than 60 per cent of the houses to take it. 710

Commissioner Maltbie: To what area do you refer?

Mr. Patterson: Take the Third Ward generally. We have been working in that territory for years, and at the present time only six per cent of our consumers use gas exclusively, and only 85 per cent use it at all, so that this assumption is the assumption of a maximum that we cannot hope to reach until there has been a vast increase in the number of houses there.

Commissioner Maltbie: You figure to charge up the entire cost of this extension to this area. 711

Mr. Patterson: Yes, sir.

Commissioner Maltbie: You have got to put on a main there some time.

Mr. Patterson: I do not see that we have, except to serve this territory, and its normal growth.

Commissioner Maltbie: You have got to serve this territory some time.

Mr. Patterson: If the territory warrants it, we will be glad to serve it.

Commissioner Maltbie: You cannot take a franchise and then sit down on your haunches and say "I will serve this territory when I get ready."

Mr. Patterson: If you take the principle you laid down in this case——

Commissioner Maltbie: Yes, and everything I said there I will stand by.

Mr. Patterson: You say there must be a prospect of remunerative return within a reasonable time, and we claim that does not
713 exist here.

Mr. Spear: Does that mean that if the time never comes when it is remunerative, that we have got to go in there?

Commissioner Maltbie: You cannot pick and choose. You cannot leave this territory out because it does not happen to pay 8 per cent.

Mr. Patterson: I want to call your attention to the fact that this is figuring nothing for the return upon our original plant.

Commissioner Maltbie: Now, you are getting around to the doctrine of the New Jersey Commission. Under their doctrine you
714 would have to pay 8 per cent on the extension and 8 per cent on the proportionate part of the system.

Mr. Patterson: I am not talking about the rest of the system, but I do say that it is proper that this section should pay its proportionate charge of the cost of the general plant which supplies this section, and that is entirely left out of these figures. Now, this extension is taxing our capacity there now, and sooner or later we will have to add to it.

Commissioner Maltbie: Yes, and Mr. Carter stated, in his application for the Consolidated Gas Company, to buy the stock of this company and of the electric lighting companies, that your capacity was already taxed, and it needed finances to carry the company on, and that they were going to put in a bigger amount of money, and that the Consolidated Gas Company were going to put in money—you cannot use that argument very effectively with me.

Mr. Patterson: I do not know just what statement was made at the time; but I think the statement was that this company had 716
been obliged, for years, to make extensions on the hundred foot basis, and that, in any case beyond that, it had adopted the policy of requiring the various people to pay a portion of the cost, to be repaid to them by credits on bills; but that does not mean that the company is obliged to make any and every extension, irrespective of what the return is to be. I do not think we should be obliged to go into every part of the Borough of Queens and serve every little hamlet in this territory.

Commissioner Maltbie: You have got to go into this area some time, and when you 717
go into that area you have got to face some lean years, because of the great expense of getting across that flat, low land which lies between your plant and this territory; and, ultimately, for that part of your area, you will have to build a larger distribution system. Now, you are charging up against this area the entire cost of this extension, which, apparently, will be used in part to give ade-

quate pressure and adequate supply of gas to that part of the Borough of Queens.

Mr. Patterson: We are extending a network of mains all over a very large section there that is sparsely settled.

Commissioner Maltbie: If you were never going to have any more houses than you have now in Douglas Manor and Dougiaston, and were not going to use this main to supply any other people, you would not build as large a main as you have designed.

Mr. Patterson: I think we would.

719 Commissioner Maltbie: Oh, no; you know you would not.

Mr. Patterson: To supply this territory, we have got to make proper provision for the future.

Commissioner Maltbie: This main will be tied on to your distribution system at other points?

Mr. Patterson: The rest of our distribution system is a low-pressure system.

Commissioner Maltbie: I am aware of that; but you cannot, ultimately, run your territory on a low-pressure system alone.

Mr. Patterson: I think it is rather remote, when we will have to change from the low-
720 pressure to high-pressure system.

Commissioner Maltbie: But you will have to have high-pressure mains tied on to your distribution system in order to give you adequate pressure. Now, there is going to be some time when you will have to face, at least for a while, proportionately low returns. Every company has to do that, and every line has to do that. There are comparatively few lines that follow the history

of the Interborough Subway, where they made money from the very first year of their start.

Mr. Patterson: But there is no prospect, for many years, of our getting that remuneration on our system.

Mr. Van Steenbergh referred to the fact that, in one part of this community, the houses had doubled in the past year. I find that he made a mistake, and that they have doubled in six years. They started with two houses in 1909.

With reference to Little Neck, Mr. Penn testified that his company had fourteen or fifteen houses in Little Neck Hills, and that ten of them were under the course of construction and four were completed, and then he says, "I don't believe there is another house in Little Neck under construction at this time, except the school building." 722

Mr. Van Steenbergh: That is not the full testimony. The testimony shows that 14 houses have been built there in the last year, and they are there now. You can go there and count them.

Mr. Patterson: I think the principle is well laid down in the Second District that there is a point where a company will not be required to go into new territory which is presently unremunerative, and I would like to read an extract from the opinion of the Commission in the Second District, in the case of Simpson against the Buffalo Gas Light Company, where the discussion was with regard to extensions of this character: In that case the Commission says: 723

"Application for such extension may range from a request to the company to lay a main for a thousand or two thousand feet in order to accommodate a few scattered customers, to a request for a main through a short connecting street between old thoroughfares in a thickly populated district. In the latter case there is a fair prospect of immediate consumption of gas due to a rapid building up of the abutting property, while it may take a long time in the former case to attain a consumption which shall be fairly remunerative upon the proposed outlay. But in
725 either case it is manifestly unfair that the consumer should pay for the extension of a main in the street, which becomes at once the property of the company, without promise or prospect of reimbursement, no matter how large the consumption of gas may ultimately become. The sale of its product is what the company has in view, and if a prospective consumer or a collection of consumers stands ready to guarantee a consumption which will justify the outlay, the gas should be furnished, providing the manufacturing facilities of the company are sufficient to supply it and the conditions of ex-
726 tending the main are reasonable. This guarantee may be in the form of a deposit to be returned when the conditions of consumption are fulfilled, or it may be given by requiring the consumer to pay for the construction of the main with an agreement to return the amount paid through a credit on bills for gas consumed. These are matters of detail. But if the consumer is required in the first instance to pay for a construction which,

upon completion, becomes immediately the property of the company, he should be reimbursed in some manner for the outlay, as soon as the use of the main begins to yield a reasonable return to the company upon the amount invested."

That is something that we have been prepared to do. That is the policy we have adopted with respect to other real estate developments in the Borough of Queens, and that is the principle which this Commission, in the case referred to, has laid down.

The opinion then says:

"But we are inclined to the opinion that 728
in any case where a canvass of a territory for which service is asked shows a probable gross annual income from private consumers of 20 per cent on the cost of the extension, it should be made free of cost to the consumer."

Mr. Patterson: On Mr. Hine's estimate of the cost of the work, it is 9.9 per cent. gross return; and on our figures it is 7 per cent. Take, if you will, Mr. Hine's figures and they have not half reached the condition of development in that section, which the Commission, in the Second District, lays down as a prerequisite for the free extension of a 729
system.

Commissioner Maltbie: That would mean a consumption, in this territory, of about 15,000,000 feet.

Mr. Patterson: Yes, as against 6,000,000. We contend that in order to make us go into that territory, where, at the most, the return is not more than 2.7 per cent to be earned, and make such an investment there, it would

amount to a taking of property without due process of law, and I will cite, in a brief which I expect to submit, some opinions by the Supreme Court of the United States with reference to railroad stations, holding that the item of expense to the company and convenience should not be the only consideration, but what is a fairly remunerative rate to the company should be considered.

Commissioner Maltbie: What do you think should be your rate of return for the first year?

Mr. Mathewson: Do you mean what we
731 think we ought to have?

Commissioner Maltbie: What you think you ought to have in order for you to be required to build this extension.

Mr. Mathewson: Mr. Spear says he thinks the company ought to have 6 per cent, and in these times it ought to have double that. We think we ought to receive 6 per cent within a year or two. Of course, we think the total return the company ought to receive on the value of its property that goes to public service should be at least 8 per cent, and in times like these it would have to be more. I think 8 per cent is about what
732 the Commission has fixed.

Commissioner Maltbie: Do you mean to say that you do not think that you should make extensions, or that your company should be required to make extensions unless they could make six per cent the first year?

Mr. Mathewson: Not under present conditions.

Commissioner Maltbie: Do you mean on account of the war?

Mr. Mathewson: Yes, and general business depression.

Commissioner Maltbie: The Consolidated Gas Company is back of this company now. If this were the old company, with its so-called feeble ability to finance, we might consider that of some force; but the Consolidated Gas Company is back of this company now, with a large surplus.

Mr. Patterson: I understand that the Consolidated Company have an application now to borrow money which is before this Commission, and the Consolidated may be in need of funds itself, therefore the Consolidated Company is no more anxious to put its money into an unremunerative investment than this company is. 734

Commissioner Maltbie: I am not sure that they are borrowing that money for the purpose of making extensions. There is a pretty good surplus there which, if turned into money, might be used for other purposes than building extensions.

Mr. Van Steenbergh: We have been hoping that we would get some of that surplus at some time.

Commissioner Maltbie: I think that is a pretty severe standard. In fact, I should be very much interested to see how many extensions are made by any company that pays six per cent the first year. I think they will be few and far between. 735

Mr. Patterson: It took six years for this community to settle, and still, on the basis of Mr. Hine's figures, it would not pay six per cent if it doubled. It would pay 5.4 per cent in six years. I think that, at the

present time, we have got to take into account the conditions affecting the real estate market. Many, if not most of these gentlemen, are engaged in real estate operations, and I note that these gentlemen seem to be more anxious than the householders themselves, to get this gas put in. Whether it is for the purpose of making a profit on the sale of lots and houses I do not know; but the real estate men are those who testified principally in this proceeding, and I know the gentlemen in that business sometimes have an undue degree of optimism regarding the
737 development of their property. Therefore, when they tell us that everybody is going to use gas, the statement should be taken with some allowance. That is a different thing from going to these people and getting their application—getting them to sign an application—for this gas. When these people find that they have got to put in gas ranges and have got to pay for bringing the gas from the main and piping it to their houses, I think they would want to consider the matter further, and if we ask them to sign applications, we would get considerably less than 60 per cent.

738 Another point is that the operating expenses of the company have very materially increased during this present year, because material has gone up very decidedly, so that the showing we would make at the present time would not be as favorable as that made for the past year.

Commissioner Maltbie: Oil is going down now, is it not?

Mr. Mathewson: Yes, it has been dropping a little, but it is a question whether that will

be over when the war is concluded. It may rise again, and perhaps it may rise before that, on account of interference with gasolene production on the other side.

Mr. Van Steenbergh referred to the condition of the streets in this territory. We were interested to find out how many of these streets were public streets, and as the best source to obtain that information from, we went to the Topographical Bureau of the City of New York. According to their maps, apparently few of these streets are public streets. I have here and will introduce in
740 evidence a copy of their map, showing which of these streets are public streets. There is testimony here to the effect that the City has watered, lighted and taken care of some of these streets, but of others they did not, so that we do not know whether they are public streets or private streets, and the Title Guarantee & Trust Company could not tell whether they were public or private.

It seems to me that the burden is on the applicants to show that we are asked to go into public streets rather than private streets.

More than that, the maps of this layout showing the streets which may be taken to
741 have been adopted by the City as public streets—show that they are only tentatively adopted—and a resolution was passed adopting them as tentative streets. We do not know how the streets may be changed or how the grades may be changed. Some of the gentlemen who are here today say that they do not know what the general condition of these streets is. We think we ought not

to be ordered to go into that territory and to work upon what may be private streets, on grades which may be changed during the next two years.

Mr. Van Steenbergh: I do not think my friend exactly means what he says—that these are not public streets. He refers to a tentative map, which has been referred to in the course of this hearing. I was the one who appeared before the Board of Estimate and objected to certain features of it, but the objection was not as to the location of these streets as they appear in his Exhibit
743 No. 7, but more particularly with reference to Douglas Manor itself, and to the widening of the Shore Drive, making that 70 feet wide and cutting down our beautiful trees. That is the position I took in the matter. That tentative map gives the streets precisely as they are on Exhibit No. 7, only by different numbers and different names, so that there should be uniformity in naming the streets in the Borough of Queens.

That is not a fair suggestion, because there is and there can be no substantial opposition to this application on that basis—because of the fact that the map is still in the
744 tentative stage and has not been formally adopted. There is no question about the streets being public streets, so far as any record goes with reference to the general layout; but there are some matters about the crossing of railroad tracks which are tentative. So far as the streets themselves are concerned, they are there to stay, and this gas company can come in there and put down its mains and pipes in these streets

without objection and without opposition from anybody.

Now, I have just a word to say on the other proposition as to the difference between the estimated cost, as made by Mr. Spear, of $86,731.69, as against $61,004.08, as made by Mr. Hine, making a difference of $25,786.29, which, it seems to me, must address itself to your Honor. I claim and contend that that is an unusually exorbitant estimate of the cost of laying these mains across this land, where there are no pavements which would be interfered with. The cost which Mr. Hine gives of $7,900 I contend is exorbitant, and that it ought to be very much less than that. 746

Let me call your attention to the proposition as to what would be the attitude of this company if we, as a private corporation, should go in there and ask for the privilege of laying mains and supplying this territory with gas? What would be the attitude of this company if a franchise of that sort were sought? It goes without saying that they want the franchise, they want the special privileges which go with it, but when the taxpayer and the resident comes here and says, "We want you to supply us with gas; we want you to do what the statute requires you to do," they say, "We must have six per cent on the investment." I never heard of such a proposition as that. That might apply to some sparsely settled territory where they would have to run miles and miles of main without the certainty of any income, but it certainly could not apply to a territory of this character. 747

Again, they are charging up the entire cost of this operation to this development. I am here not as representing any real estate company. I have no connection with or interest in any one of them. I know that my neighbors and I have invested our money here; that we are taxpayers, and we pay big taxes down there, and we want this gas. We promise to use it, and we want these people to come there and exercise the franchise. If they say they do not want it, let them say so, and we will put in a company down there, and we will buy the gas from
749 them.

ARGUMENT OF CHARLES F. MATHEWSON.

Mr. Mathewson: Mr. Commissioner, I do not propose to attempt to deal with the technical end of this proposition, and therefore I will take only a few minutes of your time. I think the case has been very ably covered by counsel.

We are met here, however, with experience, and experience teaches that, in the gas business, 60 per cent is about the limit of
750 the number of houses which take gas. That is not confined to the Borough of Queens. No doubt the Commissioner, from his study of the gas situation generally, knows the fact that about sixty per cent is the rule. Therefore, to assume that every one in this section will take gas is not only unreasonable, but impossible. We do not find our friend, Mr. Van Steenbergh, coming in here with any suggestion that the people in that

section, by some writing, will guarantee to take gas even to the extent of 60 per cent of the houses located there. No doubt, Mr. Commissioner, you will recall that when the Public Service Commission Act was amended so as to give power to order extensions and improvements, this was the subject of considerable debate at Albany, and, if I mistake not, you were there making very many and valuable suggestions, and I was there making many that were not valuable.

Commissioner Maltbie: But perhaps more effective.

752 Mr. Mathewson: The main proposition was that ultimately this power was granted to the Commission, and I pointed out at the time—and I think it met with the approval not only of the Commission but of the Committee—that no power could be given to a Commission to order extensions without limit. There was a case in the Supreme Court, which seemed to hold that extensions could be ordered only when a reasonable return within a reasonable period could be anticipated. Your Honor is familiar with the expression of this opinion in another case, which has been quoted, which, it seems to me, means merely that we would not be ex- 753 pected to go into an isolated section unless a reasonable return could be anticipated.

Commissioner Maltbie: This area is entirely different from the area covered by the opinion cited by counsel, which was further down in the Aqueduct section.

Mr. Mathewson: Your language stating the principle was so sound, that I am ready to adopt it without discussion, and I think

it presents a proposition which is entirely reasonable.

It is true that when the Consolidated Company acquired the stock of these companies, it was represented that it was in a better financial condition than the original company, and would be able to aid them; but you will recall what the situation was there. I remember presenting it to you on several occasions. The situation was that it was almost impossible for us to get funds, by reason of our limited financial ability to make the ordinary extensions within the 100-
755 foot limit, and that we always insisted, in the case of real estate development, on being guaranteed some amount, or upon having money put up with which to make these extensions. That was the situation before you when the statement of Mr. Carter and others was made. Of course, what they meant was that reasonable extensions would be made with greater ease with the Consolidated Company back of these companies, and that I find out to be true. But these companies must be dealt with as entities. The Consolidated Gas Company is merely a stockholder in these companies. If the New York &
756 Queens Gas Company were making an excessive return on its plant in this territory, so that the balance of its earnings might be applied to extensions instead of having the rate cut down to those who were already using gas, then a proposition for an extension of this character might carry some weight; but if it appears that in the balance of the territory we are not now making a fair return upon the value of our assets al-

ready employed in the public service, it makes a very different situation.

In fact, the proposition is simply this: If we extend our mains to Douglaston and Little Neck, we put a part of their gas bills upon our consumers; or, in other words, we give our consumers in Douglaston and Little Neck gas at 50 cents a thousand instead of a dollar a thousand. Stripped of all verbiage, that is the substance of the proposition here presented.

Commissioner Maltbie: Of course, it is well known that even in companies that have been running for a considerable period of 758 time, there are lines that do not yield 6 per cent a year on their extensions. That is true of street railways, trolley lines and electric light companies and gas companies. It is true that there is a certain class of people who do not pay for the gas used. That is true of many small users of gas and electricity; but that does not argue that the company does not have to supply them. In fact, many of the companies know that they are not going to make six per cent return, and yet build their extensions and supply the classes of persons who do not pay the cost of the service. The question of exten- 759 sion, however, is not the only question. The question remains whether they will pay, in all probability, as the territory grows.

Mr. Mathewson: I appreciate what your Honor says in that regard, and I will endeavor in this case, as I do in every case, to treat the matter fairly. I know that many carriers make extensions which are not profitable except as feeders. I know that if you

take a flush gas company you may find that, oftentimes, it will extend its mains when a non-flush company cannot do so. I know that these astute business men who are in control of this corporation would extend at any time when they believed that, within a reasonable period, they could get a reasonable return on their investment, but we are not dealing here with a proposition in which a man may sometimes hazard his own money unwisely. A man may carry on a public service business if he wants to, and make only three per cent; but we are dealing here
761 with a proposition where you are asked to order and compel us to do something. We all do foolish things at times; but this matter is put up to us as a matter of compulsion. It goes without saying that if we believed in a reasonable time we could get a reasonable return, we would be anxious to extend over that territory as quickly as we could.

We are located in a peculiar position. Being within the City of New York, we have had our rate reduced to $1.00, although we are very much smaller than many communities where they are paying more than a dol-
762 lar for gas. On the other hand, we do not have the advantage from being a part of the City which accrues to a more thickly settled part of the City. We are having a hard time to make a reasonable return on our investment. I do not know how the company could produce this $60,000. They could not do it, except as they might borrow it from the Consolidated Gas Company.

Commissioner Maltbie: What do you lay aside every year for depreciation?

Mr. Mathewson: I am told it is 12 cents per thousand, less repairs.

Commissioner Maltbie: What does it amount to, or what is your output?

Mr. Mathewson: I could not tell you what that figures.

Commissioner Maltbie: What is your output?

Mr. Mathewson: About 200,000,000 feet, I should think.

Commissioner Maltbie: Then on 200,000,000 feet you are setting aside 12 cents per thousand cubic feet.

Mr. Mathewson: Yes, less repairs. 764

Commissioner Maltbie: Repairs would be about 3 per cent.

Mr. Mathewson: I remember that, in the Consolidated Gas Company it appeared that they ran from 3 cents up to 11 or 12 cents.

Commissioner Maltbie: I have just been over the figures in the Woodhaven Gas Company case——

Mr. Mathewson: But we have no works. In the Great Neck territory they are charging $1.35 for gas in exactly the same kind of a territory as our friends want us to serve at a dollar a thousand, and which we would have to serve at that rate if we made 765 this extension. I am not expressing my sorrow that the people are charged $1.35 per thousand there, but because, in our position, we can only charge $1.00 a thousand, and we are in a bad fix. If we had an amortization fund, it would probably be invested so that it could not be realized on quickly, and we would have to borrow the money to make this extension.

Commissioner Maltbie: Many of the companies put their amortization funds into extensions.

Mr. Mathewson: We are making some extensions in the hundred-foot limit, which the law requires.

Commissioner Maltbie: Are you getting 6 per cent. a year on those extensions?

Mr. Mathewson: We hope to do so within a reasonable time.

Mr. Spear: You want to take into consideration the fact that the extensions we are making are short extensions, while here is
767 the case of an extension amounting to 20 per cent of our entire system.

Commissioner Maltbie: You will have to do that some time, and there will be a fight when you do do it.

Mr. Mathewson: Then why not wait until we are making some reasonable return in our territory? We would like to give these gentlemen gas at 50 cents a thousand, or, in other words, pay half of their gas bills, if we could do so in justice to ourselves.

Commissioner Maltbie: Is there anything further in this case?

Mr. Patterson: I would like the privilege
768 of submitting a brief to answer some of the suggestions that have been made on the other side.

Commissioner Maltbie: How much time do you want?

Mr. Van Steenbergh: I have been protesting against delay in this case, but if the briefs go in and they will let me have a copy of it by next Tuesday, I will answer it.

Mr. Mathewson: It will be unanswerable.

Commissioner Maltbie: You may have until Tuesday of next week to file a brief.

(Whereupon, at 5.15 o'clock P. M., the hearing in the above-entitled matter was closed, on the 6th day of October, 1914.)

Statement *re* Exhibit No. 1.

This exhibit consists of three blue print maps entitled as follows:

(a) Bayside, Douglaston and Little Neck.
(b) Douglaston. 770
(c) Douglaston Manor.

Printing of these maps is omitted by consent.

Exhibit No. 2.

1.	Nathaniel Doyle	$20000.00
2.	Semper	6000.00
3.	Morris	9000.00
4.	Blum	9000.00
5.	Mayer	9000.00
*6.	Scuette	50000.00
7.	Buffington	5000.00
8.	Schley	9000.00
9.	Whiteside	9000.00 771
10.	Sampson	20000.00
*11.	Greaves	15000.00
12.	Van Steenbergh	12000.00
13.	Kalker	10000.00
14.	Shields	10000.00
15.	Hirsch	18000.00
16.	Ewart	10000.00
17.	Wider	8000.00

772 *Schedule B—Exhibit 2*

	18.	Shuttleworth	15000.00
	19.	Bang	12000.00
	20.	Johnson	10000.00
	21.	Davis	9000.00
	22.	Tobin	9000.00
	23.	Country Club	8000.00
	24.	J. S. Brownson	9500.00
	25.	C. S. & A. L. Brownson	14000.00
	26.	Angell	18000.00
	27.	McNaughton	12000.00
	28.	Boyer	9000.00
	29.	Farrell	8000.00
773	30.	Prindle	10000.00
	31.	Douglas Manor Inn	30000.00
	32.	Boisse	12000.00
	33.	Rice	14000.00
	34.	Slater	12000.00
	35.	Klein	12000.00
	*36.	Ralston	14000.00
	37.	Wright	10000.00
	38.	Burtis	10000.00
	39.	Canning	14000.00
	40.	Hardiman	14000.00
	41.	Roundley	10000.00
	42.	Schubert	12000.00
	43.	Breed	12000.00
	44.	Coope	9000.00
774	45.	Plummer	15000.00
	46.	Ohmer	8000.00
	47.	Schappe	8000.00
	48.	Miss Butler	7000.00
	49.	J. H. Welch	12000.00
	50.	Johnstone	14000.00
	51.	Faddis	15000.00
	52.	Winthrop Welch	10000.00
	53.	J. H. Welch	10000.00
	54.	Doherr	9000.00

Schedule B—Exhibit 2 775

55.	Newman	12000.00
56.	Chapman	10000.00
57.	Bartlett	8000.00
58.	Jeffries	7000.00
59.	Withers	9000.00
60.	Cohen	7000.00
*61.	Boileau	7000.00
62.	Wheeler	7000.00
63.	Vogler	8000.00
64.	Muller	8000.00
65.	Palmer	9000.00
66.	Holmes	10000.00
67.	Walcutt	12000.00
68.	Jacobs	9000.00
69.	Wistaft	8000.00
70.	Charles Jacobs	8000.00
71.	Williams	7000.00
72.	Billings	12000.00
73.	J. H. Welch	9000.00
74.	Cramer	8000.00
75.	Foster	8000.00
76.	Dean	8000.00
77.	R. G. Butler	6000.00
*78.	Shipman	6000.00
79.	Von Bauer	7000.00
80.	Joseph Randell	8000.00
81.	Mathewson	6000.00
82.	Hammel	7000.00
83.	S. J. Randell	7000.00
84.	Lamb	7000.00
85.	Howard	9000.00
86.	J. H. Welch	9000.00
87.	Wesley	7000.00
88.	Webb	6000.00
89.	Hallowell	7000.00
90.	William Reid	5000.00
91.	Ewry	7000.00

776

777

778 *Schedule B—Exhibit 2*

	92.	Gladwin	8000.00
	93.	Jeffrey	8000.00
	94.	Smith	8000.00
	95.	Diack	7000.00
	96.	Heyer	10000.00
	97.	Bachman	15000.00
	98.	Johnson	12000.00
	99.	J. H. Welch	9000.00
	100.	Manahan	8000.00
	101.	Hyde	6000.00
	102.	Rockwell	4000.00
	103.	McQuade	3000.00
779	104.	Cohen	5000.00
	105.	Mott	3000.00
	106.	Van Vliet	15000.00
	107.	Railroad Station	
	108.	John Reid	6000.00
	109.	Osborne	6000.00
	110.	Van Dyke	7000.00
	111.	Warner	12000.00
	112.	Hixon	8000.00
	113.	Brewer	7000.00
	114.	Merle Johnson	10000.00
	115.	McGlashen	10000.00
	116.	Anderson	6000.00
	117.	Ficken	2500.00
	118.	Niesless	2500.00
780	119.	Doyle	2500.00
	120.	Ficken	2500.00
	121.	Hill	18000.00
	122.	Reinhard	7000.00
	123.	Dodge	7000.00
	124.	Du Boise	7000.00
	125.	Cartwright	6000.00
	126.	Mortimer	5000.00
	127.	Fire House	
	128.	Levy	2500.00

Schedule B—Exhibit 2 781

129.	Link	2500.00	
130.	Hughes	2500.00	
131.	Link	2500.00	
132.	Randell	6000.00	
133.	Williams	7000.00	
134.	Helmus	6000.00	
135.	Helmus	6000.00	
136.	Gabler	8000.00	
137.	Unknown	5000.00	
138.	"	5000.00	
139.	"	5000.00	
140.	"	4000.00	
141.	Munda	3000.00	782
142.	Munda	3000.00	
143.	Unknown	4000.00	
144.	Seymour	4000.00	
145.	Unknown	4000.00	
146.	Jones	4000.00	
147.	Zion Church		
148.	Oberer	4000.00	
149.	Harper	6000.00	
150.	Unknown	4000.00	
151.	Guerrand	4000.00	
152.	Rupel	4000.00	
153.	Thomas	4000.00	
154.	Pudney	4000.00	
155.	Seaman	4000.00	
156.	Langhans	4000.00	783
157.	Page	5000.00	
158.	Usher	4000.00	
159.	Barnes	5000.00	
160.	Buschek	4000.00	
161.	White	4000.00	
162.	Mallory	4000.00	
163.	School		
164.	Scott	7000.00	
165.	O'Leary	7000.00	

166.	Hamilton	7000.00
167.	Bussenius	6000.00
168.	Byers	5000.00
169.	James Stuart	4000.00
170.	Fred Stuart	4000.00
171.	Seymour	4000.00
172.	Van Velsen	4000.00
173.	Anderson	7000.00
174.	Maginnis	6000.00
175.	Burns	6000.00
176.	Lyons	6000.00
177.	Magaarden	6000.00
178.	Streuys	5000.00
179.	Terrasse	6000.00
180.	Hoyt	5000.00
181.	Jones	5000.00
182.	Hughes	6000.00
183.	Graham	5000.00
184.	Helmus	7000.00
185.	Gould	5000.00
186.	Bentley	5000.00
187.	Bishop	3000.00
188.	Parish Hall	
189.	Church	
190.	Coyle	5000.00
191.	Badgely	4000.00
192.	Unknown	5000.00
193.	"	4000.00
194.	Beadel	9000.00
195.	McLellan	9000.00
*196.	Parsons	20000.00
197.	Foster	12000.00
198.	Peper	10000.00
199.	Robbins	9000.00
200.	Newman	5000.00
201.	Coombs	8000.00
202.	Constable	6000.00

Schedule B—Exhibit 2 787

203.	Murphey	6000.00	
204.	Corry	6000.00	
205.	Dane	7000.00	
206.	Harris	8000.00	
207.	Taylor	8000.00	
208.	Stanley	7000.00	
209.	Welch	9000.00	
210.	Ward	7000.00	
211.	Von Breton	10000.00	
212.	Schroeder	7000.00	
213.	Le Bron	7000.00	
214.	Kearton	7000.00	
215.	Dane	8000.00	
216.	Wise	7000.00	788
217.	Walsh	6000.00	
218.	Hudson	6000.00	
219.	Jenkins	7000.00	
220.	Schofield	6000.00	
221.	Schofield	6000.00	
222.	Williams	6000.00	
223.	Stone	6000.00	
224.	Melzendorf	7000.00	
225.	Deane	7000.00	
226.	McConnell	6000.00	
227.	Woodward	7000.00	
228.	"	7000.00	
229.	"	7000.00	
230.	C. C. Frisbie	6000.00	789

790 **Exhibit No. 3.**

DOUGLASTON, DOUGLAS MANOR, DOUGLASTON PARK and LITTLE NECK

					Aug. 1914.
	2″	3″	4″	6″ Houses	
Broadway				15600	
"			14500		
Main Ave.			3100		22
Hamilton	600				7
Pine		960			12
Orient		1050			8
Poplar	840				9
Willow	660				8
791 Prospect	450				2
Willow	350				4
Cherry	750				10
Prospect	300				6
Hillside		1300			5
West Drive		4270			13
Bay Ave.	1300				12
Cedar Lane	540				4
Forest	180				1
Ridge Rd.	2070				10
Park Lane	670				5
" "	150				1
" "	300				1
Arleigh Rd.	1700				10
792 Holly Wood	1170				6
Manor Rd.	340				3
" "	1170				4
Westmoreland	500				2
Beverly	950				3
"	480				1
Grosvenor	970				3
Richmond	780				3
Knoll Wood	330				3
Kenmore	450				2

Schedule B—Exhibit 3

793

Douglas	150			1	
"	230			1	
East Drive	540			2	
" "	1080			3	
Centre "	750			2	
" "	970			5	
Douglaston Ave.		1200		10	
Dartmouth Rd.	635			5	
Princeton Rd.	270			2	
Virginia Rd.	990			5	
Boulevard		550		1	
Broadway			1303	2	
Broadway			3000	21	
Little Neck Ldg. Rd.		2000		17	794
Old House Ldg. Rd.		2250		21	
Bay View Ave.		1950		9	
Sound View Ave.		900		2	
3rd Ave.	1200			6	
Clinton Ave.	900			8	
No name, St.	600			3	
West End Drive	700			3	
Marathon Ave.	700			4	
Queens Pl.	600			2	
Westmoreland Ave.	800			1	
Glenwood Ave.	900			4	
Summit St.	300			1	
Locust Pl.	400			1	
					795
Old House Ldg. Rd.	900			6	
Cutter Ave.	900			1	
Station Rd.	500			3	
	33015	16430	21903	15600	332

Schedule B—Exhibit 3

33015 Ft. 2″ main laid @ 37c per foot	$12215.55	
16430 " 3″ " " " 47c " "	7722.10	
21903 " 4″ " " " 68c " "	14894.04	
15600 " 6″ " " " 91c " "	14196.00	
Compressor installed	1500.00	
Extra for draw bridge at creek	1000.00	
Pavement to replace	7900.00	
Total cost of mains	$59427.69	$59427.69

The maps submitted by Douglaston Civic Association show in Douglaston, Douglas Manor and Douglaston Park 219 houses, and Little Neck has by actual count 113 houses, so we will assume that every house is occupied and will be a consumer

Service 50′ @ 23c per foot	$11.50		
5 lt. meter	5.35		
Governor	3.15		
Material & Labor	2.00	$22.00	
332 Services etc. @ $22.00 each			7304.00
Total cost of mains, services & Meters			$66731.69
219 Consumers @ 20,000 cu. ft. per year	4,380,000 cu. ft.		
113 " " 15,000 " " " "	1,695,000 " "		
Total estimated consumption	6,075,000 " "		

Profit @ .0945 per M—$574.09 or 8/10% on total investment

Total length of mains 86948 feet
262 ft. to a house
cost $201 per house

The above figures do not include any amount for engineering supervision, contingencies, overhead charges nor interest and taxes during construction.

COPY BOUND CLOS

Exhibit No. 4. 799

(Copy)

Telephone Address Answer to Writer
Connecting All Departments
119 Flushing

NEW YORK & QUEENS GAS CO.
EIGHTY-EIGHT MAIN STREET
FLUSHING, NEW YORK

M. H. Spear
Secretary and Manager

STATEMENT OF TWELVE MONTHS 1913

800

Gas Sales	217 334 73
Less Deduction & Allowances	609 72
Gross Earnings	216 725 01
Cost to Manufacture	79 998 55
Cost to Distribute	62 212 78
Amortization	7 736 53
Taxes	11 832 81
Cost Delivered	161 780 67
Net Earnings	54 944 34
Miscellaneous Revenue	8 126 06
Interest Revenue	249 79
Total Income	63 320 19
Fixed Charges	42 474 43
Divisible Surplus	20 845 76
Sales Cubic Feet	220 679 300

801

Owing to the increase in prices of raw materials the return on our investment during the year 1914 will show a substantial decrease from the 1913 figures.

Based on 1,000 cubic feet sold .0945

LOSE IN CENTER

802 **Statement *re* Exhibit No. 5.**

This exhibit consists of three blue print maps entitled as follows:

(a) Bayside, Douglaston and Little Neck.
(b) Douglaston.
(c) Douglaston Manor.

The maps constituting Exhibit 5 are the same as the maps constituting Exhibit 1, with the addition of the markings showing the proposed location and size of mains and the figures in ink showing the numbers of the houses.

Printing of these maps is omitted by consent.

803

Statement *re* Exhibit No. 6.

This exhibit consists of a map of the Third Ward of the Borough of Queens, dated January, 1898, and corrected in 1912.

Printing of this map is omitted by consent.

Statement *re* Exhibit No. 7.

This exhibit consists of a map purporting to show the streets in Douglaston, Little Neck and vicinity dedicated to the City of New York according to the
804 records of the Topographical Bureau of the City of New York.

Printing of this map is omitted by consent.

Statement *re* Exhibit No. 8.

This exhibit consists of a blue print showing houses at Little Neck, August 5, 1914.

Reproduction of this map is omitted by consent.

Exhibit No. 9. 805

(Copy)

PUBLIC SERVICE COMMISSION, FIRST DISTRICT

Estimate by W. F. Hine, Chief Gas Engineer, P. S. C., of Cost of Distribution System to Supply Douglaston, Little Neck and Douglas Manor With Gas

CASE No. 1856.

33,015 ft. of 2 inch mains at 0.275	$9,079.13	806
16,430 ft. of 3 inch mains at 0.424	6,966.32	
21,903 ft. of 4 inch mains at 0.545	11,938.14	
15,600 ft. of 6 inch mains at 0.847	13,213.20	
Pavement (Company's estimate)	7,900.00	
New Compressor	2,000.00	
Line under creek	2,000.00	
332 services comp. with meters at 22.00 (Company's estimate)	7,304.00	
Total Cost of Installation including all engineering, supervision, contingencies, etc.	$60,400.79	807
Interest during construction—(Assuming 4 mo. for construction and interest at 6%)	604.01	
Total	$61,004.80	

808

Exhibit No. 10.

(Copy)

DETAIL OF ESTIMATES
UNIT COST OF MAINS
W. F. HINES, CHIEF GAS ENGINEER, P. S. C.

CASE No. 1856

	2" W.I.	3" W.I.	4" W.I.	6" W.I.
Pipe	$0.092	$0.191	$0.272	$0.480
Labor Laying	0.046	0.076	0.082	0.120
Excavation and Backfill	0.100	0.100	0.116	0.132
Valves & fittings	0.012	0.018	0.024	0.037
Incidentals & Contingencies.	0.012	0.019	0.025	0.038
Engineering & Superintendence	0.013	0.020	0.026	0.040
Total per lineal ft.	$0.275	$0.424	$0.545	$0.847

809

810

Exhibit No. 11.

(Copy)

JOHN SIMMONS CO.
104-110 Centre Street,
New York

F.E.W. August 31, 1914

r York & Queens Gas Company,
Mr. M. H. Spear, Sect'y,
Flushing, New York.

ır Sir:—

Ve confirm our telephone message in response to your inquiry, quoting l Weight Strictly Iron Pipe, fitted with recessed couplings from mill arload at prices as follows with freight paid to Flushing, New York:—

2″	Butt-welded	at 37	cts. per ft.	less	71.4 & 5%
3″	Lap-welded	at 76½	cts. " "	"	69.9 & 5%
4″	" "	at $1.09	" "	"	69.9 & 5%
6″	" "	at 1.92	" "	"	69.9 & 5%

he above prices are for plain black pipe and if it is desired that this e be coated there will be the following additional charge:—

2″ at 1c net per foot
3″ at 1c " " "
4″ at 1¼c net per foot
6″ at 2c " " "

hese prices are for immediate acceptance as all iron and steel prods are now at a lower basis than we think will prevail for the future.

Yours truly,

JOHN SIMMONS CO.
(Signed) F. E. WALKER
Secretary

Y. Public Service Commission,
Dept.
rder No. 1856 Date Sept. 2/14
Exhibit No. 1211
Philip Reporter

Order No. 5734

814 **Statement *re* Schedule C.**

This schedule consists of a copy of the opinion of Commissioner Maltbie, approved February 11, 1915, and is printed in full at pages 21 to 35 of this record as Exhibit No. 2 attached to the petition for a writ of certiorari and reprinting thereof is omitted by consent.

Statement *re* Schedule D.

This schedule consists of the final order of the Commission, adopted March 19, 1915, and is printed in full at pages 19 to 21 of this record as Exhibit
815 No. 1 attached to the petition for a writ of certiorari and reprinting thereof is omitted by consent.

Statement *re* Schedule E.

This schedule consists of a copy of the application of the Relator for rehearing, dated and verified April 10, 1915, and is printed in full at pages 36 to 46 of this record as Exhibit 3 attached to the petition for a writ of certiorari, and reprinting thereof is omitted by consent.

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816 **Statement *re* Schedule F.**

This schedule consists of a copy of the order of the Commission denying Relator's application for rehearing, adopted April 27, 1915, and is printed in full at pages 47 to 48 of this record as Exhibit No. 4 attached to the petition for a writ of certiorari, and reprinting thereof is omitted by consent.

Stipulation Waiving Printing of Exhibits. 817

IT IS HEREBY STIPULATED between the parties hereto that Exhibits 1, 5, 6, 7 and 8 need not be made a part of the return to the writ of certiorari in the above-entitled proceeding, and that said exhibits need not be printed in the record of said proceeding, but that said exhibits may be produced before the court upon any hearing or appeal taken in this proceeding with the same force and effect as though made a part of said return and as though printed in said record.

Dated, October 27, 1915.

KRAUTHOFF, HARMON & MATHEWSON, 818
Attorneys for Relator.

GEO. S. COLEMAN,
Attorney for Respondents.

Stipulation Waiving Certification.

IT IS HEREBY STIPULATED AND AGREED that the foregoing papers, consisting of the writ of certiorari, order allowing writ, petition for writ, the return made by the respondents and the several papers thereto annexed and forming a part thereof, and the stipulation waiving printing of exhibits, are true and correct copies of said originals and of the whole thereof, and the certification thereof by 819
the Clerk of the County of New York is hereby waived.

Dated, October 27, 1915.

KRAUTHOFF, HARMON & MATHEWSON,
Attorneys for Relator.

GEO. S. COLEMAN,
Attorney for Respondents,
Public Service Commission,
First District.

Order of Appellate Division Appealed From.

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 3rd day of March, 1916.

Present:

Hon. John Proctor Clarke,
Presiding Justice.
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
" Vernon M. Davis,
Justices.

No. 8428.

PEOPLE ex Rel. NEW YORK AND QUEENS GAS COMPANY, Relator,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD, and WILLIAM HAYWARD, Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Respondents.

Order.

This matter having come on to be heard on the writ of certiorari granted herein and attested on the 30th day of April, 1915, the petition of the New York and Queens Gas Company, verified April 30, 1915, upon which the said writ was granted, order allowing said writ, made at a Special Term of the Supreme Court, in and for the County of New York, on the 30th day of April, 1915, the return to said writ, made by the respondents, Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, constituting the Public Service Commission of the State of New York in and for the First District, dated October 13, 1915, with the several papers thereto annexed and forming a part thereof, marked respectively Schedules A to F, inclusive; and after hearing John A. Garver, Esq., of counsel for the relator, in support of said petition and writ, and Arthur Du Bois, Esq., of counsel for the respondents, and William H. Van Steenbergh, Esq., for the Douglaston Civic Association, in opposition thereto; it is

Ordered, that said writ of certiorari be and it hereby is sustained, and that the order and determination of the Public Service Commission, made March 19, 1915, reviewed under said writ, be and it is hereby annulled.

Enter.

J. P. C.

Notice of Appeal to the Court of Appeals.

Supreme Court, New York County.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. NEW YORK AND QUEENS GAS COMPANY, Relator,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD, and WILLIAM HAYWARD, Commissioners, Constituting the Public Service Commission of the State of New York for the First District.

Notice of Appeal to the Court of Appeals.

SIRS: Please take notice that the above-named respondents hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court for the First Judicial Department entered and filed herein in the office of the Clerk of said Appellate Division on the 10th day of March, 1916 and filed in the office of the Clerk of the County of New York on the 15th day of March, 1916, and that the said respondents hereby appeal from each and every part of the said order.

Dated, New York, March 16, 1916.

GEORGE S. COLEMAN,
Counsel to Public Service Commission for the First District, Attorney for Respondents-Appellants.

No. 154 Nassau Street, Borough of Manhattan, New York City.

To Messrs. Krauthoff, Harmon & Mathewson, Attorneys for Relator-Respondent, No. 55 Wall Street, Borough of Manhattan, New York City; William F. Schneider, Esquire, Clerk of the County of New York.

Opinion of Appellate Division.

Supreme Court, Appellate Division, First Department, February, 1916.

John Proctor Clarke, P. J.; Victor J. Dowling, Walter Lloyd Smith, Alfred R. Page, Vernon M. Davis, JJ.

No. 8428.

PEOPLE ex Rel. NEW YORK AND QUEENS GAS COMPANY, Relator,

vs.

EDWARD E. McCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, ROBERT C. WOOD, and WILLIAM HAYWARD, Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Respondents.

Certiorari to Review an Order of the Public Service Commission, First District, requiring the relator to extend its mains and services to Douglaston, including Douglas Manor.

John A. Garver, for Relator.
William H. Van Steenbergh, for Douglaston Civic Association.
Arthur Du Bois, for Respondents.

SMITH, *J.*:

The New York and Queens Gas Co. has its headquarters and manufacturing plant in Flushing, L. I., and is at present engaged in supplying that town and the adjoining town of Bayside with gas. East of Bayside a marsh bisected by a navigable creek extends for somewhat over a mile, and east of this marsh are situated the towns of Douglaston and Douglas Manor. The order of the Public Service Commission reads in part as follows:

"Ordered that the New York and Queens Gas Company, be and hereby is directed to extend its mains and gas services in such a manner as may be required reasonably to serve with gas that community lying in the Third Ward of the Borough of Queens, City of New York and known as Douglaston, including Douglas Manor."

It is the propriety of this order that it is sought to have reviewed in this proceeding.

The Public Service Commissions Law, Section 66, subd. 2, empowers the Commission:

"To order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities."

We have no doubt that under this law the question remains for the Court to determine, upon the review of the determination of the

Public Service Commission, whether the extension ordered was a reasonable extension. This question must be considered in the aspect, first, of the needs of the community, and, second, of the burden placed upon the company.

First. Douglaston and Douglas Manor have about 230 houses built. The place is supplied with electric light, so that the gas in question will not be required for illuminating purposes, but only for the purpose of cooking and possibly for heating, during the summer months. None of the houses which have been erected are piped for gas, indicating that it was not the expectation of those who built the same that gas would be furnished. If this gas were needed for illuminating purposes as well as for heating and cooking, the necessity would be much more imperative and an entirely different question might be presented.

Second. For a distance of five miles from the gas house in Flushing to the end of the main at Bayside the mains of the company would have to be changed and 6-inch pipes substituted for 4-inch pipes which now exist. For a mile from the end of the main in Bayside there will be no consumers of gas, as the mains pass through marsh land where there are no residences. From the records of the company it appears that for the gas furnished the manufacturing and distributing expenses amount to 72.7c. per thousand feet. This does not include any interest upon the moneys invested, and the company has never declared a dividend. This leaves 27.3c. per thousand feet upon the price of $1 per thousand feet which the company is authorized to charge. A very liberal estimate of the gas which will be consumed in the houses already constructed in Douglaston, Douglas Manor and Little Neck has been given as 6,075,000 cubic feet. Upon this estimate at 27.3c. per thousand there will be an income to the company over and above the cost of manufacturing and distributing of about $1,660 per year. This, as before said, allows nothing for interest upon bonds or dividends upon stock. The stock of this company is presumably all taken. It has a bonded debt of $800,000, and presumably it must borrow the moneys necessary for the new construction required. Those moneys I am satisfied would amount to between $60,000 and $70,000. Assuming, for the argument, the smaller amount, the interest upon $60,000 at 5 per cent amounts to $3,000. This would only be about one-half repaid by the $1,660, the return from the gas furnished at Douglaston. The balance, or about $1,500, would be a burden upon the company which must be paid out of other income from other customers. It is undoubtedly true that it is not necessary that the first return from an extension should be large, provided there is reasonable ground to foresee that within a reasonable time the return from the investment is going to be large enough to cover the expenses and the interest upon the moneys required to make the same. The promise here is so remote that it does not seem to us reasonable to require this company to make this expenditure for this construction, in view of the fact that the only requirement for gas is for cooking and heating in the summer months and that the place is already supplied with electricity for illumination.

We are not unmindful of the obligations owing by a public service corporation to serve well the entire community through which it has a franchise, but the statute has defined the extent of its obligation as requiring a reasonable effort so to do. Our attention has been called to the statement of the Commissioners at the time that this determination was made as to the representations made by the Consolidated Gas Co. before the Commission when application was made by that company for permission to buy the stock of the relator. Whatever inference might be drawn from those statements as to the reasons which influenced the Commissioners in making the determination hereunder reviewed, we are of the opinion that the facts presented by the record do not present a reasonable justification for the order made.

The determination of the Commission must, therefore, be annulled without costs, and the application of the petitioners denied.

All concur.

Stipulation Waiving Certification.

It is hereby stipulated and agreed that the foregoing papers, consisting of the writ of certiorari, the order allowing writ, the petition for writ, the return made by the respondents, Public Service Commission for the First District, and the several papers thereto annexed and forming a part thereof, and the stipulation waiving printing of exhibits, the order of the Appellate Division appealed from and the notice of appeal to the Court of Appeals, are true and correct copies of the originals and of the whole thereof, and that certification thereof pursuant to Section 1315 of the Code of Civil Procedure is hereby waived.

Dated, New York, March 26, 1916.

GEORGE S. COLEMAN,
Attorney for Appellants.
SHEARMAN & STERLING,
Attorneys for Relator-Respondent.

EXHIBIT C.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. NEW YORK AND QUEENS GAS COMPANY, Respondent,

v.

EDWARD E. MCCALL et al., Public Service Commissioners, Appellants.

(Decided October 3, 1916.)

Appeal by the Defendants from an Order of the Supreme Court, Appellate Division, First Department, Sustaining a Writ of Certiorari and Annulling an Order of the Public Service Commission of the First District.

Certain residents and property owners of Douglaston and Douglas Manor in the third ward of the borough of Queens, New York City, applied to the public service commission of the first district for an order requiring the relator in this proceeding, the New York and Queens Gas Company, to extend its gas mains and services in such manner as may be necessary reasonably to supply with gas the communities of Douglaston and Douglas Manor. On a review of the proceedings by the Supreme Court at the Appellate Division, the order of the public service commission was annulled. From that determination the residents and property owners have appealed to this court.

Douglaston and Douglas Manor are situated in the northeast corner of the borough of Queens near Little Neck Bay. To the southeast of Douglaston and also within the third ward of the borough is Little Neck, which extends to the borough line. To the west are the communities of Bayside and Flushing which are separated from Douglaston by a salt marsh about half a mile or more wide, and extending a mile inland. Through the middle of the marsh runs a creek navigable for small boats and along each side of the marsh is a high hill. The relator is at present supplying gas to Flushing and Bayside, but its mains and pipes are not sufficient to meet the additional requirements of Douglaston and Douglas Manor. The company's gas plant is located in Flushing about six miles from Douglaston, and it will be necessary to lay a main from the plant to Bayside and carry it from there down the hill, over the marsh and up the hill on the other side to reach Douglaston.

Douglaston and Douglas Manor are supplied with electricity for lighting purposes, and gas is desired mainly for cooking during the summer months. The Appellate Division decided that upon the whole case it was unreasonable to require the relator to extend its services in compliance with the order of the public service commission. Further facts appear in the opinion.

Arthur Du Bois for appellants.

John A. Garver for respondent.

CUDDEBACK, *J.*:

The public service commissions are authorized by law "to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities." (Pub. Serv. Comm. Law (Cons. Laws, ch. 48), §66.)

Under the authority of this statute the public service commission for the first district made the order requiring the relator to extend its gas mains and services to meet the reasonable requirements of Douglaston and Douglas Manor.

In applying the provisions of this statute the court at the Appellate Division said: "We have no doubt that under this law the question remains for the court to determine upon the review of the determination of the Public Service Commission whether the extension ordered was a reasonable extension."

This statement of the law is quite likely to create a misapprehension as to the power of the court. The court has no power to substitute its own judgment of what is reasonable in place of the determination of the public service commission, and it can only annul the order of the commission for the violation of some rule of law.

The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in the conduct of their business and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed perhaps by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control.

The law governing the commissions is well expressed by the Minnesota Supreme Court in State v. Great Northern Ry. Co. (153 N. W. Rep. 247). It is there said: "The order may be vacated as unreasonable if it is contrary to some provision of the federal or state constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if having regard to the interests of both the public and the carrier it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment." (See, also, People ex rel. Town of Hempstead v. State Board of Tax Comm'rs, 214 N. Y. 594; People ex rel. Morrissey v. Waldo, 212 N. Y. 174.)

In Interstate Commerce Com'n v. Illinois Central R. R. Co. (215 U. S. 452, 470) the chief judge, after stating the power of the court, continued: "It is equally plain that such perennial powers lend no

support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it, is the question."

The court at the Appellate Division did not, therefore, have the power to determine that the extension of the relator's gas mains and pipes ordered by the public service commission was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreasonable if it was an unlawful, arbitrary or capricious exercise of power.

The relator argues in support of the power of the Appellate Division to review generally the reasonableness of the order of the public service commission that the necessary authority is given by the provision with regard to the writ of certiorari contained in section 2140 of the Code of Civil Procedure. That section reads as follows:

"§2140. The questions, involving the merits, to be determined by the court upon the hearing, are the following only:

"1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

"2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

"3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

"4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

"5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence."

I do not understand that this section of the Code extends the power of the court beyond the rules laid down in State v. Great Northern Ry. Co. and Interstate Com. Com'n v. Illinois Central R. R. Co. (supra).

It is urged that under the provisions of subdivision 5 of section 2140 the court may set aside the determination of the commission as against the weight of evidence, regarding it the same as the verdict of a jury.

The court had occasion to say in People ex rel. Smith v. Hoffman (166 N. Y. 462, 476) in construing section 2140 of the Code of Civil Procedure, as applied to the determination of the board of examination under the Military Code: "The review authorized does not substitute the judgment of the civil court for that of the military court

upon the evidence or the merits, but inquires into jurisdiction of the subject-matter, the exercise of authority in relation to the subject-matter according to law, the violation of any rule of law to the prejudice of the relator and the like."

Of course, if the court at the Appellate Division had annulled the order of the public service commission and granted a rehearing in the exercise of discretion, its order would not be reviewable in this court (Barrett v. Third Ave. R. R. Co., 45 N. Y. 628), but that is not the case. The court sustained the writ of certiorari and finally annulled the order of the public service commission without granting a rehearing.

The question now is whether or not there was any evidence to show that the order of the public service commission was an unlawful and arbitrary exercise of power. Acme Realty Co. v. Schinasi, 215 N. Y. 495; People ex rel. Manhattan Ry. Co. v. Barker, 165 N. Y. 305; Otten v. Manhattan Ry. Co., 150 N. Y. 395).

There was no dispute as to the basic facts of the case. There was some variation in the estimates of the witnesses as to the cost of iron pipe and the expense of engineering supervision and like matters, but there was no real disagreement as to the cost of the extension of the relator's system of gas distribution, and the increase in revenue that the relator would probably receive therefrom.

The court at the Appellate Division in its opinion summed up the proof on the subject. The court said that the cost of the extension would be between $60,000 and $70,000, and that the increased return to the relator from the consumption of gas would be about $1,660 per year, which is only one-half of the interest at five per cent upon the extension.

This is very far from showing that the order of the public service commission was simply an arbitrary and capricious exercise of power. Indeed it was not asserted to be so by the court. The court in annulling the order claimed and exercised the right to review the action of the public service commission and pass generally upon its wisdom and expediency.

In Douglaston and the neig-boring territory in the third ward of the borough of Queens covered by the relator's franchise, there are some 332 houses. The occupants of these houses can get no gas unless they are supplied by the relator. It is the duty of the relator to supply their needs if practicable. (Wisconsin, M. & P. R. R. v. Jacobson, 179 U. S. 287; People ex rel. Woodhaven Gas Light Co. v. Deehan, 153 N. Y. 528.) The cost of the extension is not the only matter for consideration. (Oregon R. R. & N. Co. v, Fairchild, 224 U. S. 510, 529.)

The court at the Appellate Division substituted its own judgment for that of the public service commission in determining that the latter's order was unreasonable. This decision if allowed to stand will seriously hamper the commissions in the discharge of their duties, and go far toward defeating the efforts of the legislature to establish agencies to regulate the great public service corporations.

The order should, therefore, be reversed and the order of the

public service commission reinstated, with costs in the Appellate Division and in this court.

Willard Bartlett, Ch. J., Chase, Hogan, Cardozo and Pound, JJ., concur; Hiscock, J., not voting.

Order reversed, etc.

STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of the People of the State of New York, ex rel. New York and Queens Gas Company v. Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the First District, decided by the Court of Appeals on the third day of October, 1916, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion, and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals at the City of Albany, in the State of New York, this 30th day of January, 1917.

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
R. M. BARBER,
[SEAL.] *Clerk of the Court of Appeals.*

STATE OF NEW YORK,
Court of Appeals:

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for the said State, do hereby certify that R. M. Barber is the Clerk of said Court, having custody of the seal of said Court, and of the decisions, minutes and records thereof, and that J. Newton Fiero is the Official Reporter of said Court, having custody of the official opinions written and handed down by said Court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication by said Clerk, and said Reporter of the annexed copy of the official opinion rendered in the case of People of the State of New York, ex rel. New York and Queens Gas Company v. Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the First District, decided by the said Court of Appeals on the third day of October, 1916, is in due form, and sufficient under the laws of the State of New York and the rules and practice

of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as Clerk of said Court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as Reporter of said Court, appended thereto, is the true and genuine signature of the said J. Newton Fiero.

In witness whereof, I Have hereunto subscribed my official signature, at the Chambers of said Court, at the Capitol of said State, in the City of Albany and State of New York, on the 30th day of January, in the year one thousand nine hundred and seventeen.

FRANK H. HISCOCK,
As Chief Judge of the Court of Appeals of the State of New York.

[Endorsed:] Exhibit C. Court of Appeals. People of the State of New York ex rel. New York and Queens Gas Company, Respondent, v. Edward E. McCall, et al., Public Service Commissioners, Appellants. (Copy.) Opinion (Cuddeback, J.).

At a Special Term, Part II, of the Supreme Court Held in and for the County of New York, at the County Court House, in the Borough of Manhattan, in said County, on the 11th Day of October, 1916.

Present: Hon. John W. Goff, Justice.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. NEW YORK AND QUEENS GAS COMPANY, Relator,

against

EDWARD E. McCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood, and William Hayward, Commissioners Constituting the Public Service Commission of the State of New York for the First District, Respondents.

Order for Judgment on Remittitur.

The above named respondents having appealed to the Court of Appeals in the State of New York from an order of the Appellate Division of the Supreme Court for the First Judicial Department entered and filed herein in the office of the Clerk of the said Appellate Division on the tenth day of March 1916 and filed in the office of the Clerk of the County of New York on the fifteenth day of March 1916, which order sustained a writ of certiorari and annulled the order and determination of the Public Service Commission made March 19, 1915, and said appeal having been duly argued at the Court of Appeals on May 22 and May 23, 1916 and after due deliberation the Court of Appeals having adjudged that the said order so appealed from as aforesaid should be reversed and the determination of

the Public Service Commission affirmed with costs in the Appellate Division and in the Court of Appeals,

Now on reading and filing the remittitur from the Court of Appeals herein and upon motion of George S. Coleman, Attorney for the complainants, it is

Ordered that said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

J. W. G., *J. S. C.*

[Endorsed:] Supreme Court, County of New York. The People of the State of New York ex rel. New York and Queens Gas Company, Relator, against Edward E. McCall and others constituting the Public Service Commission of the State of New York for the First District, Respondents. Order for judgment on remittitur with notice of entry. Copy. George S. Coleman, Counsel to Public Service Commission for the First District, Attorney for Respondents, 120 Broadway, Borough of Manhattan, New York City. To Shearman & Sterling, Esquires, Attorneys for Relator.

Supreme Court, New York County.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. NEW YORK AND QUEENS GAS COMPANY, Relator,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood, and William Hayward, Commissioners Constituting the Public Service Commission of the State of New York for the First District, Respondents.

Judgment,

An order having been entered and filed herein in the office of the Clerk of the Appellate Division for the First Judicial Department on the 10th day of March, 1916, a certified copy whereof was filed in the office of the Clerk of the County of New York on the 15th day of March, 1916, which order sustained a writ of certiorari and annulled the order and determination of the Public Service Commission for the First District made March 19, 1915, and the respondents having appealed from the said order to the Court of Appeals, and the Court of Appeals having sent hither its remittitur filed herein on the 11th day of October, 1916, by which it appears that the said Court of Appeals has adjudged that the said order so appealed from should be reversed and the determination of the Public Service Commission for the First District affirmed with costs in the Appellate Division and in the Court of Appeals and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court by an order duly entered herein on the 11th day of Octo-

ber, 1916 having ordered and adjudged that said order and judgment be made the order and judgment of this Court, and the costs and disbursements of the above named respondents having been duly taxed at the sum of three hundred and seventeen and 82/100 dollars ($317.82);

Now, on motion of George S. Coleman, attorney for the respondents, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court, and that the above named respondents, Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, constituting the Public Service Commission of the State of New York for the First District, recover of the relator, New York and Queens Gas Company, the sum of three hundred and seventeen and 82/100 dollars ($317.82) and have execution therefor.

Dated, New York, October 17, 1916.

WM. F. SCHNEIDER, *Clerk.*

[Endorsed:] Supreme Court, New York County. The People of the State of New York ex rel. New York and Queens Gas Company, Relator, against Edward E. McCall and others constituting the Public Service Commission of the State of New York for the First District, Respondents. Judgment with notice of entry. Copy. George S. Coleman, Counsel to the Public Service Commission for the First District, Attorney for respondents, 120 Broadway, Borough of Manhattan, New York City.

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. NEW YORK AND QUEENS GAS COMPANY, Plaintiff in Error,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood, and William Hayward, Commissioners, Constituting the Public Service Commission of the State of New York, for the First District, Defendants in Error.

Petition for Writ of Error.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals:

The petition of the New York and Queens Gas Company respectfully shows:

I. On October 3, 1916, the Court of Appeals of the State of New York made and entered a final order and judgment herein, reversing an order of the Appellate Division of the State of New York, First Department, which vacated an order and determination of the said Public Service Commission for the First District, made March

19, 1915, directing your petitioner to extend its gas mains to Douglaston and Douglas Manor, in the County of Queens; and the said final order and judgment of the Court of Appeals directed that the said order and determination of the said Public Service Commission should be reinstated. Thereafter, on October 17, 1916, the records and proceedings in the said cause having been remitted to the Supreme Court of the State of New York in and for New York County, the said final order and judgment of the Court of Appeals were made and entered as the final order and judgment of the said Supreme Court. Thereafter, on or about October 26, 1916, your petitioner duly made an application to the said Court of Appeals for a reargument or for an amendment of its said remittitur; but the said application was, on December 28, 1916, in all respects denied by the said Court of Appeals.

II. The said Court of Appeals of the State of New York is the highest Court of the said State of New York, in which a decision in this cause could be had.

III. By the said final order and judgment entered in the said Supreme Court of the State of New York, and the proceedings had prior thereunto in this cause, and by the said order denying the motion for a reargument, your petitioner has been denied the guaranty and protection provided for by the Constitution and laws of the United States and a right, privilege or immunity, specially set up and claimed by your petitioner under the said Constitution and laws has been denied it, and the validity of an authority exercised under the State of New York, which was drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, was upheld; all of which has been made to appear on the record of the said cause, as will more fully appear by an inspection of the said record, and of the assignment of errors which is hereto annexed, marked "Exhibit A," and filed with this petition, and from the briefs submitted on behalf of your petitioner to the said Appellate Division and Court of Appeals, and from the notice of motion on the application for a reargument before the Court of Appeals, and the brief submitted by your petitioner thereon.

IV. The said printed record, which contains a copy of the opinion of the Appellate Division of the Supreme Court of the State of New York, for the First Department, on making its said order herein, is submitted herewith, marked "Exhibit B"; a copy of the opinion of the said Court of Appeals in the said cause is hereto annexed, marked "Exhibit C"; copies of the said briefs submitted by your petitioner to the said Appellate Division and Court of Appeals are submitted herewith, marked, respectively "Exhibit D" and "Exhibit E"; and copies of the said motion for a reargument and the brief submitted thereon are submitted herewith, marked, respectively, "Exhibit F" and "Exhibit G." The Federal questions above referred to appear in all of the said briefs in the petition for a rehearing before the said Public Service Commission (Record, fol. 111), and in the petition for a writ of certiorari to review the final order of the said Public Service Commission (Record, fol. 38), and in the said motion for a reargument before the said Court of Appeals.

Wherefore, your petitioner prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of the errors and the reversal of the order and judgment so complained of, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States; that the said writ operate as a supersedeas; that the amount of security for costs which your petitioner shall give and furnish on said writ of error may be fixed, and that, upon the giving of such security, all further proceedings on the part of said Commission be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Albany, January 30, 1917.

SHEARMAN & STERLING,
Attorneys for Petitioner.

STATE OF NEW YORK,
County of New York:

L. B. Gawtry, being duly sworn, says, that he is the Vice-President of the New York and Queens Gas Company, which is a domestic corporation and is the petitioner named in the foregoing petition, and that the said petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and, that as to those matters, he believes it to be true.

LEWIS B. GAWTRY.

Sworn to before me January 29", 1917.

[Seal Wallace Young, Notary Public, County of New York.]

WALLACE YOUNG,
Notary Public, New York County,
Notarial No. 14; *Register No.* 8016.

Commission Expires March 30, 1918.

The writ of error as prayed for in the foregoing petition is allowed and the bond is fixed at the sum of One Thousand Dollars.

Albany, January 30, 1917.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

Exhibit A.

Court of Appeals.

The People of the State of New York ex Rel. New York and Queens Gas Company, Plaintiff in Error,

against

Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood, and William Hayward, Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Defendants in Error.

Assignment of Errors.

Now comes the above named New York and Queens Gas Company and, in connection with the petition for a writ of error filed by it herewith, says that, in the records and proceedings in this cause, and in the final order and judgment made and entered herein on October 17, 1916 by the Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, and in the order of the said Court of Appeals, dated December 28, 1916, denying a reargument, there is manifest error in this, to wit:

That the order of the Public Service Commission of the State of New York for the First District, made March 19, 1915, was illegal and void, in that it deprived the above named New York and Queens Gas Company of its property, without due process of law, and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the said Company to extend its distributing system, under great physical difficulties and at enormous expense, to an independent and remote community which the said Company was under no present duty to supply with gas, where it appeared that the said Gas Company would not obtain an adequate return upon the expenditure required to make such extension.

Wherefore, the said New York and Queens Gas Company prays that the final order and judgment of the said Supreme Court of the State of New York, entered in the office of the Clerk of New York County, on October 17, 1916, pursuant to the said remittitur of the said Court of Appeals of the State of New York, be reversed, and that judgment be rendered herein in favor of the plaintiff-in-error, and annulling the said order of the Public Service Commission of the State of New York for the First District, with costs, in all the Courts.

SHEARMAN & STERLING,
Attorneys for Plaintiff in Error,
Relator in the Lower Court.

Albany, January 30, 1917.

[Endorsed:] Court of Appeals. The People of the State of New York ex rel. New York and Queens Gas Company, Plaintiff in error, against Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the First District, Defendants in error. Petition for Writ of Error and Assignment of Errors. Shearman & Sterling, Attorneys for Petitioner, 55 Wall Street, New York.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between the People of the State of New York ex rel. New York and Queens Gas Company, Plaintiff-Respondent, and Plaintiff-in-error, and Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the First District, Defendants-Appellants, and Defendants-in-error, wherein was drawn in question a right, privilege or immunity specially set up and claimed under the Constitution of the United States, and the decision was against such right, privilege or immunity, and wherein was drawn in question the validity of an authority exercised under the said State of New York on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said New York and Queens Gas Company, the plaintiff-in-error, as by its complaint appears;

We being willing that error, if any, hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, by you, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 31st day of January, 1917.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States for the Southern District of New York.

Allowed by—
FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

January 30, 1917.

[Endorsed:] M2—144. Supreme Court of the United States. The People of the State of New York ex rel. New York and Queens Gas Company, Plaintiff-in-error, against Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the first District, Defendants-in-error. Writ of error. John A. Garver, Attorney for Plaintiff-in-error, 55 Wall Street, New York. Received Feb. 7th, 1917.

UNITED STATES OF AMERICA:

The President of the United States of America to Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood, and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the First District, and George S. Coleman, Esq., their attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York for the County of New York, in an action wherein the New York and Queens Gas Company is the plaintiff-in-error, and you are the defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals, this 30 day of January, 1917, and of the Independence of the United States of America, the one hundred and forty-first year.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

[Endorsed:] Supreme Court of the United States. The People of the State of New York ex rel. New York and Queens Gas Company, Plaintiff-in-error, against Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, constituting the Public Service Commission of the State of New York, for the First District, Defendants-in-error. Citation. John A. Garver, Attorney for Plaintiff-in-error, 55 Wall Street, New York. Due service of a copy of the within is hereby admitted. New York, Jan. 31, 1917. Geo. S. Coleman, Attorney for Public Service Commission for the 1st Di'ct.

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. NEW YORK AND QUEENS GAS COMPANY, Plaintiff-in-Error,

against

EDWARD E. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood, William Hayward, Commissioners Constituting the Public Service Commission of the State of New York for the First District, Defendants-in-Error.

Bond on Writ of Error.

Know all men by these presents: That we, New York and Queens Gas Company, as principal, and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 120 Broadway, in the Borough of Manhattan, in the City of New York, as surety, are held and firmly bound unto Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood, and William Hayward, Commissioners constituting the Public Service Commission of the State of New York for the First District, in the true and just sum of one thousand dollars ($1,000), to be paid to the said Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners constituting the Public Service Commission of the State of New York for the First District, their successors and assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals. Dated this Thirty-first day of January, Nineteen hundred and seventeen.

Whereas, lately in the Supreme Court of the State of New York, in a suit pending in said Court between The People of the State of New York ex rel. New York and Queens Gas Company, Plaintiff-in-Error, against Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood, and William Hayward, Commissioners constituting the Public Service Commission of the State of New York for the First District, Defendants-in-Error, a judgment was rendered on a remittitur from the Court of Appeals of the State of New York against said The People of the State of New York ex rel. New York

and Queens Gas Company, Plaintiff-in-Error, reversing an order of the Appellate Division of the State of New York, First Department, which vacated an order and determination of said Public Service Commission for the First District made March 19, 1915, directing the New York and Queens Gas Company to extend its gas mains to Douglaston and Douglas Manor, in the County of Queens, and further directing that the said order and determination of said Public Service Commission should be re-instated; and the said Plaintiff-in-Error having obtained from the Chief judge of the Court of Appeals of said State a writ of error, and filed a copy thereof in the Clerk's office of said Court to reverse said judgment in the aforesaid suit, and a citation directed to said Edward E. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood, and William Hayward, Commissioners constituting the Public Service Commission of the State of New York for the First District, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days from date thereof.

Now, the condition of the above obligation is such, that if the said New York and Queens Gas Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

NEW YORK AND QUEENS GAS COMPANY,
By LEWIS B. GAWTRY, *Vice-Pres.*

[Seal New York and Queens Gas Company, New York, Incorporated 1904.]

Attest:
M. H. SPEAR, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By JAMES R. KINGSLEY, *Attorney-in-fact.*

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

Attest:
ERNEST L. HICKS, Attorney-in-fact.

STATE OF NEW YORK,
County of New York, ss:

On the Second day of February in the year 1917 before me personally came Lewis B. Gantry, to me known, who being by me duly sworn did depose and say that he resides in New York City that he is the Vice-President of the New York and Queens Gas Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of

the board of directors of said corporation, and that he signed his name thereto by like order.

[Seal Wallace Young, Notary Public, County of New York.]

WALLACE YOUNG,
Notary Public, New York County.

Notarial No. 14.
Register No. 8016.
Commission Expires March 30, 1918.

STATE OF NEW YORK,
County of New York, ss:

On the 31st day of January, in the year 1917, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said James R. Kingsley further said that he is acquainted with Ernest L. Hicks and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Ernest L. Hicks subscribed to the within instrument, was in the genuine handwriting of the said Ernest L. Hicks and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

[Seal Fannie A. Massey, Notary Public, New York County.]

F. A. MASSEY,
Notary Public, New York County, #65.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kings-
" ley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn,
" Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and
" Frank A. Eickhoff, all of the City of New York, State of New York,
" be and each of them is hereby appointed Attorney-in-Fact of this
" Company and empowered to execute and deliver and attach the seal
" of the Company to any and all bonds or undertakings for or on be-
" half of this Company, in its business of guaranteeing the fidelity
" of persons holding places of public or private trust and the perform-

"ance of contracts other than insurance policies, and executing or "guaranteeing bonds or undertakings required or permitted in all "actions or proceedings, or by law required, permitted or allowed.

"Such bonds or undertakings to be executed for the Company by "any one of the said Henry B. Platt, James R. Kingsley, Frank H. "Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, "Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to "be attested in every instance by one other of the said Attorneys-in-"Fact, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, Ernest L. Hicks, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 31st day of January, 1917.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

ERNEST L. HICKS,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement December 31, 1916.

Assets.

Home Office Building and Annex		$2,600,000.00
Other Real Estate		94,848.59
Bonds and Stocks		6,325,004.25
First Mortgage Loans, etc.		414,807.08
Unpaid Premiums, (subsequent to Oct. 1, 1916)		1,183,222.31
Unpaid Premiums, (prior to Oct. 1, 1916)		389,748.37
Bank Deposits for use of Branch Offices, etc		73,800.00
Cash in Banks and Trust Companies		1,401,770.79
Total Assets		12,483,201.39
(Assets deducted according to ruling and regulations of various Insurance Departments, etc.)		
Unpaid Premiums, prior to Oct. 1, 1916	$389,748.37	
Net amount of Special Deposits made under laws of various States, etc.	258,806.17	
		648,554.54
Total Assets (on basis of statement to Insurance Department, etc.)		11,834,646.85

Liabilities.

Reserve for Unearned Premiums		$3,263,734.21
Reserve for Claims, Admitted and Unadmitted		2,215,044.15
Reserve for Advance Premiums and Return Premiums		209,345.65
Reserve for Commissions (Unpaid Premiums subsequent to Oct. 1, 1916)		204,782.45
Reserve for Premium Taxes, and Expenses in Transit		145,000.00
Reserves, Special and Contingent		468,365.61
Reserve for Unpaid Reinsurance Premiums		98,912.09
Capital Stock, Paid up in Cash	$3,000,000.00	
Surplus and Undivided Profits. $2,878,017.23		
Less amount deducted, according to Insurance Department regulations (See above) 648,554.54		
Surplus and Undivided Profits (on basis of statement to Insurance Departments, etc.)	2,229,462.69	
		5,229,462.69
		$11,834,646.85

STATE OF NEW YORK,
County of New York, ss:

Ernest L. Hicks being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of the said Company, as of December 31, 1916, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

ERNEST L. HICKS.

Subscribed and sworn to before me, this 31" day of Jan., 1917.

[Seal Fannie A. Massey, Notary Public, New York County.]

F. A. MASSEY,
Notary Public, New York County. #65.

[Endorsed:] Court of Appeals. The People of the State of New York ex rel. New York and Queens Gas Co., Plaintiff-in-Error, vs. Edward E. McCall et al., Defendants-in-Error. Bond on Writ of Error. I approve of the within Bond and of the sufficiency of the surety therein. Dated Feb'y 5, 1917. Frank H. Hiscock, Chief Judge Court of Appeals. Fidelity and Deposit Company of Maryland, 120 Broadway, New York.

STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York, held at the Capitol in the City of Albany, on the twenty-eighth day of December, A. D. 1916.

Present: Hon. Willard Bartlett, Chief Judge, presiding.

THE PEOPLE, &c., ex Rel. NEW YORK AND QUEENS GAS COMPANY, Respondent,

vs.

EDWARD E. McCALL and Others, Constituting the Public Service of the State of New York for the First District, Appellants.

Order on Motion for Reargument.

A Motion for a re-argument of the above cause having been heretofore made upon the part of the respondent herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

A Copy.

[SEAL.] W. J. ARMSTRONG,
Deputy Clerk.

[Endorsed:] State of New York. Court of Appeals. The People, &c., ex rel. New York and Queens Gas Company, Respondents, vs. Edward E. McCall and others, constituting the Public Service Commission of the State of New York, for the First District, Appellants. Order on Motion for Re-argument. George S. Coleman, Counsel to the Public Service Commission for the First District, No. 120 Broadway, New York City.

Court of Appeals.

PEOPLE ex Rel. NEW YORK AND QUEENS GAS COMPANY, Respondent,

against

EDWARD J. McCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood, and William Hayward, Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Appellants.

Notice of Motion for Reargument or to Amend the Remittitur.

Take Notice, that, on the affidavit of John A. Garver, verified October 26, 1916, annexed hereto, the case on appeal, the remittitur

of the Court of Appeals, and all the proceedings herein, we shall move at a term of this Court, to be held at the State Capitol, in the City of Albany, New York, on November 20th, 1916, at the opening of Court on that day, or as soon thereafter as counsel can be heard:

I. That this Court request the return of its remittitur herein.

II. For an order permitting a reargument of the appeal herein.

The grounds for applying for a reargument are as follows:

1. That this Court erred in reversing the said order of the Appellate Division and in directing the reinstatement of the said order and determination of the Public Service Commission, First District.

2. That this Court overlooked or misapprehended the following points, which are decisive of the case and which were duly submitted by counsel:

(*a*) That the Public Service Commission has no jurisdiction to make an order involving an unreasonable extension of the mains of the relator.

(*b*) That there was no competent proof of facts showing that the extension ordered was reasonable.

(*c*) That, in making the said order and determination, a majority of the Public Service Commission, First District, did not consider whether the extension involved was reasonable.

(*d*) That there was, upon all the evidence, such a preponderance of proof against the reasonableness of the said extension that the verdict of a jury affirming that such extension was reasonable, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence.

(*e*) That since, upon all the evidence, the said extension was clearly unreasonable, and it was conclusively established that the relator would not receive an adequate return on its investment therein, a construction of Section 63 of the Public Service Commission Law which would leave the question of reasonableness entirely to the determination of the Public Service Commission, would render that statute unconstitutional, both under Article First, Section 6 of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States, since it would permit the relator to be deprived of its property without due process of law.

(*f*) That many of the streets through which the relator was directed to lay its mains, by the said order of the Public Service Commission, are not public streets.

(*g*) This Court misapprehended the effect of the decisions of the Supreme Court of the United States regarding the review of orders made by the Interstate Commerce Commission, since that Court has always considered such orders to be legislative acts, while in this State the orders of the Public Service Commissions, and similar bodies, are treated as being quasi-judicial, and they are made subject to review by the courts, by certiorari proceedings.

III. In case a reargument should be denied, for an order amending the said remittitur so that, instead of reversing the order of the

Appellate Division and reinstating the order of the Public Service Commission, First District, herein, it may remit this case to the Appellate Division, First Department, with instructions to rehear and redetermine the same, and, in so doing, to consider only the following questions:

1. Whether the said Public Service Commission, First District, had jurisdiction of the subject matter of the determination under review.

2. Whether the authority conferred upon the said Public Service Commission, First District, in relation to that subject matter, was pursued in the mode required by law in order to authorize it to make such determination.

3. Whether, in making the said determination, any rule of law affecting the rights of the parties hereto was violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the said determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof against the existence of any of those facts, that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the Court as against the weight of evidence.

IV. For such other and further relief as may be just.

New York, October 26, 1916.

Yours, etc.,

SHEARMAN & STERLING,
Attorneys for Respondent,
55 Wall Street, New York.

To George S. Coleman, Esq., Attorney for Appellants.

Court of Appeals.

PEOPLE ex Rel. NEW YORK AND QUEENS GAS COMPANY, Respondent,

against

EDWARD J. MCCALL, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, Robert C. Wood, and William Hayward, Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Appellants.

Affidavit of John A. Garver.

COUNTY OF NEW YORK:

John A. Garver, being duly sworn, says:

1. I am a member of the firm of Shearman & Sterling, the attorneys for the relator herein.

2. This was an appeal taken by the respondents from an order of the Appellate Division, First Department, vacating an order and determination of the Public Service Commission, First District, made March 19, 1915, directing the relator to extend its gas mains to Douglaston, in the County of Queens. The appeal was argued before this Court on May 22 and May 23, 1916; and this Court reversed the order of the Appellate Division and directed that the order and determination of the Public Service Commission should be reinstated. An order was entered in the Supreme Court, New York County, on October 11, 1916, making the order of this Court the order of the Supreme Court.

3. In reaching its conclusion that the order of the Appellate Division should be reversed, I believe that this Court overlooked or misapprehended a number of important points which are decisive of the case, and which were mentioned in my brief on the appeal or in the course of the argument. These points are enumerated in the foregoing notice of motion; and it is submitted that they are of sufficient importance to justify this Court in requesting the return of its remittitur and ordering a reargument of the appeal.

4. Even if the Appellate Division erred in vacating the order of the Public Service Commission, or if it exceeded its jurisdiction in passing on the reasonableness of the said order instead of confining itself strictly to the questions enumerated in Section 2140 of the Code of Civil Procedure, it is submitted that there were ample grounds under that Section upon which the order of the Public Service Commission should have been vacated, or at least upon which the case could have been sent back to the Public Service Commission for a rehearing. It is, therefore, respectfully requested that if the motion for a rehearing is denied, this Court recall its remittitur for the purpose of amending the same by directing that the case be sent back to the Appellate Division for further action, instead of that the order of the Public Service be reinstated.

(Sd.) JOHN A. GARVER.

Sworn to before me, October 26, 1916.

JAMES L. BANKS, JR.,
Notary Public, New York County No. 446,
New York Register No. 8567.

Commission Expires Mar. 30, 1918.

[Endorsed:] Court of Appeals. People ex rel. New York and Queens Gas Company, Respondent, against Edward J. McCall, J. Sergeant Cram, George V. S. Williams, Robert C. Wood and William Hayward, Commissioners, etc., Appellants. Affidavit and Notice of Motion for Reargument or to Amend Remittitur. Shearman & Sterling, Attorneys for Respondent, 55 Wall Street, N. Y.

STATE OF NEW YORK,
Court of Appeals,
Clerk's Office:

I hereby certify that I have compared the preceding with the original notice of motion for a reargument, filed in this office on October 26, 1916, and the order of the Court of Appeals denying the same, filed in this office on December 28, 1916, and that the same is a correct transcript therefrom and of the whole thereof.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this ninth day of February, 1817.

[Seal of Ct. of Appeals.]

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

STATE OF NEW YORK,
County of New York,
Clerk's Office of the Supreme Court
of the State of New York for the
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 7th day of February 1917, and in obedience thereto, do hereby certify that the foregoing pages numbered from One to 312 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of The People of the State of New York ex rel. New York and Queens Gas Company, Relator, against Edward E. McCall and others, constituting the Public Service Commission of the State of New York for the First District, Respondents mentioned in said Writ of Error, as the same remain of record and on file in my office; and that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 14th day of February 1917.

[Seal Supreme Court of the State of New York.]

WM. F. SCHNEIDER, *Clerk.*

Endorsed on cover: File No. 25,773. New York Supreme Court. Term No. 943. The People of the State of New York ex Rel. New York and Queens Gas Company, plaintiff in error, vs. Edward E. McCall et al., Commissioners, constituting the Public Service Commission of the State of New York for the First District. Filed February 16th, 1917. File No. 25,773.

7

Office Supreme Court, U. S.
FILED
APR 28 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 943. 407

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in Error

vs.

EDWARD E. McCALL *et al.*, COMMISSIONERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT
Defendants in Error

MOTION TO DISMISS FOR LACK OF JURISDICTION OR TO AFFIRM JUDGMENT BELOW AND BRIEF IN SUPPORT OF MOTION.

GEORGE S. COLEMAN
ARTHUR DuBOIS
of Counsel for Defendants in Error

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Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY, Plaintiff in Error *against* EDWARD E. MCCALL *et al.*, Commissioners, constituting the Public Service Commission of the State of New York for the First District Defendants in Error	October Term 1916 No. 943

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT

And now comes the Public Service Commission of the State of New York for the First District by its Counsel appearing in its behalf, and moves this Court

(I) To dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:

(1) It does not appear from the record that the questions relied upon by the plaintiff in error to give jurisdiction to this Court were presented to the state courts for consideration at the proper time and in the proper manner.

(2) The Court of Appeals of the State of New York

based its decision upon a ground which does not involve, and is not claimed to involve, a Federal question.

(3) No Federal question sufficient to give jurisdiction to this Court to review the decision of the state court is involved in the cause or was decided by the Court of Appeals of New York State.

(II) To affirm the judgment of the Supreme Court of the State of New York, which is sought to be reviewed by the writ of error herein, on the ground that the rulings, decisions and judgment in the said Supreme Court are obviously correct; that it is manifest that the writ of error was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

Together with this motion the defendants in error serve upon said plaintiff in error a copy of their brief to be filed in the Supreme Court in support of the said motion.

Dated, New York, April 20, 1917

GEORGE S. COLEMAN
ARTHUR DUBOIS
Of Counsel for Defendants in Error

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY, Plaintiff in Error *against* EDWARD E. McCALL *et al.*, Commissioners, constituting the Public Service Commission of the State of New York for the First District Defendants in Error	October Term 1916 No. 943

Sir.—Please take notice that the defendants in error in the above entitled action will on the 14th day of May, 1917, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court Room in the City of Washington, District of Columbia, move this Court on the records herein, which are printed in one book:

1. To dismiss the writ of error herein on the ground that this Court is without jurisdiction of the cause sought to be reviewed by said writ of error, in that:

It does not appear from the record that the questions relied upon by the plaintiff in error to give jurisdiction to this Court were presented to the state courts for consideration at the proper time and in the proper manner.

The Court of Appeals of the State of New York based its decision upon a ground which does not involve, and is not claimed to involve, a Federal question.

No Federal question sufficient to give jurisdiction to

this Court to review the decision of the state court is involved in the cause or was decided by the Court of Appeals of New York State.

2. To affirm the judgment of the Supreme Court of the State of New York which is sought to be reviewed by the writ of error herein on the ground that the rulings, decisions and judgment in the said Supreme Court are obviously correct; that it is manifest that the writ of error was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

Together with this motion the defendants in error serve upon said plaintiff in error a copy of their brief to be filed in the Supreme Court in support of the said motion.

Dated, New York, April 20, 1917

GEORGE S. COLEMAN
ARTHUR DUBOIS
of Counsel for Defendants in Error
120 Broadway
Borough of Manhattan
City of New York

To JOHN A. GARVER, ESQUIRE
Counsel for Plaintiff in Error
55 Wall Street
City of New York

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY, Plaintiff in Error *against* EDWARD E. McCALL *et al.*, Commissioners, constituting the Public Service Commission of the State of New York for the First District Defendants in Error	October Term 1916 No. 943

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS OR TO AFFIRM JUDGMENT.

This cause has been brought to this Court by a writ of error from the Supreme Court of the State of New York after the Court of Appeals, the highest court of the State of New York, had unanimously reversed an order of the Appellate Division of the Supreme Court and had unanimously confirmed an order of the Public Service Commission for the First District (record p. b).

The order of the Commission which had been thus upheld by the highest court of the State of New York directed the gas company to build an extension of its gas mains so as reasonably to serve with gas a community in the northeasterly corner of Queens County, known as Douglaston and Douglas Manor (r. pp. 19-20). The authority to make this order was conferred by Chapter 480

of Laws of New York 1910 known as the Public Service Commissions Law, Section 66, subd. 2, which reads as follows:

> "§66. GENERAL POWERS OF COMMISSIONS IN RESPECT TO GAS AND ELECTRICITY. Each commission shall within its jurisdiction:
>
> • • • • • • • •
>
> 2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities."

This was interpreted by the Court of Appeals to mean that the Commission had power to order extensions which *in the opinion of the Public Service Commission* were reasonable.

The power of the New York courts to review the orders of the Commission is conferred by Section 2140 of the Code of Civil Procedure of the State of New York, Chapter XVI, Title 2-a:

"Article Seventh. The writ of certiorari, to review the determination of an inferior tribunal.

* * * * * * * *

"§2140. QUESTIONS TO BE DETERMINED.

The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence."

The effect of the decision of the highest court in New York was so to interpret these two state statutes that it is now settled law that the Commission may order such extensions of gas mains as are reasonable in its (the Commission's) opinion and that the court, in reviewing the

Commission's order, may not substitute its own opinion of what is reasonable for the Commission's deliberate decision on that point. This is well expressed in the opinion of the Court of Appeals in this case where Judge Cuddeback says (r. p. 280):

> "The court has no power to substitute its own judgment of what is reasonable in place of the determination of the public service commission, and it can only annul the order of the commission for the violation of some rule of law * * *. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporation over which they were given control."

The Assignment of Error

The assignment of error (r. p. 289) is that the order of the Public Service Commission was illegal and void in that it deprived the relator gas company of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

The expense of the extension and the inadequate return to be received from that extension are urged to prove that this order illegally deprives the company of its property. There is no other assignment of error, and the question which the plaintiff in error desires to present to this Court, which it is alleged is a Federal question, is whether an order made by the Public Service Commission which requires the Gas Company in the performance of its public duty to expend money in build-

ing an extension is unconstitutional when the immediate return from that extension is likely to be less than three per cent. upon the expenditure to be made.

Facts on Motion to Dismiss or to Affirm Judgment

Douglaston, including Douglas Manor, forms the extreme northeastern part of the Borough of Queens, City of New York. The Douglaston residence community is about a mile and a half from the nearest gas mains (r. p. 99 fol. 297), which are at the easterly side of Bayside on the corner of Lawrence Boulevard and Tenth Street.

New York and Queens Gas Company, the relator, is a gas corporation authorized by its charter to manufacture and supply gas in the Borough of Queens (r. p. 7 fol. 21). Its franchise covers the entire third ward of said Borough including Douglaston and Douglas Manor (r. p. 137 fol. 410).

The Commission in the hearing which preceded the making of the order had complete information. Maps were received in evidence showing the location of every house in the territory to be served (Exhibit 1, r. p. 62 fol. 184 and r. p. 257 fol. 770) and the estimated cost of each house was given (r. p. 61 fol. 182, p. 257 fols. 770-789). In the Douglaston (including Douglas Manor) district there were 230 houses of an average cost of about $7,750 (Exhibit 2, r. p. 257 fols. 770-789). The name of each resident is given and it appears (r. p. 64 fol. 190) that there were more than 225 buildings in which gas would be used the year round.

The Commission also had before it a statement of the expense of furnishing gas to these consumers. The estimated cost of construction of the extension was given by

the Commission's engineers at $61,004.80 (r. p. 165 fol. 494, r. p. 269 fol. 805) which included a five per cent. allowance for engineering and superintendence (r. p. 166 fol. 497). This figure also allowed for the construction in Broadway of a new four-inch main from the works at Flushing to Broadway and Sanford St., Flushing and of a new six-inch main on Broadway (where gas mains had never been laid) to Main Avenue, Douglaston (r. p. 113 fol. 337), which would take care of future growth of gas consumption in adjoining territory of 300 to 1000 per cent. (r. p. 164 fols. 490, 491).

Mr. Spear, the gas company's engineer (r. p. 101 fol. 302, p. 266 fols. 797, 798), estimated the cost of the extension at $66,731.69, exclusive of engineering supervision, contingencies, overhead charges, interest and taxes during construction for which he gave the immoderate figure of 30 per cent., or over $20,000, of which $10,000 was for engineering (r. p. 107 fol. 319, p. 126 fol. 377). On cross-examination he admitted that he had not "gone into these figures at all, to see just what the cost would be" (r. p. 126, fol. 377). The only difference in the estimate of cost of construction between the engineers of the Commission and those of the company was this percentage for engineering, superintendence and similar matters.

The New York courts, as appears by the opinion of Judge Cuddeback in rendering the decision of the Court of Appeals, (r. p. 282) decided that "there was no dispute as to the basic facts of the case," and that the cost of the extension of the gas company's system of gas distribution would be between $60,000 and $70,000 and that the increased return to the gas company from consump-

tion of gas in Douglaston would be about $1,660 per year or about 2½ per cent. This was held to be far from indicating an arbitrary or capricious exercise of power.

ARGUMENT ON MOTION TO DISMISS OR TO AFFIRM JUDGMENT.

POINT I

The alleged Federal question is wholly without merit.

The Federal question, if any, is whether the order of the Public Service Commission and the judgment of the New York Courts upholding that order as reasonable deprive the gas company of its property without due process of law and deny to it the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

Every regulatory act of a public service commission may in a sense be said to deprive a company of its property if by order the company is compelled to expend money, but the right of a state legislature or a state commission to compel such expenditures to be made in the performance of the duty owing to the public is now universally recognized even though there may be little or no increased financial return to the company.

Chesapeake & Ohio Ry. Co. *v.* Public Service Comm. of West Virginia, 242 U. S. 603 (decided Feb. 5, 1917)

Chicago, B. & Quincy R. R. Co. *v.* Wisconsin R. R. Commission, 237 U. S. 220, 229

Oregon R. R. & Nav. Co. *v.* Fairchild, 224 U. S. 510, 529

Missouri Pacific Ry. Co. *v.* Kansas, 216 U. S. 262, 279

Atlantic Coast Line R. R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1, 26

The Commission Hearing

While the company may be deprived of its property it is merely submitting to governmental control and its rights are amply protected if the regulatory order has been made after a fair hearing in which ample opportunity to be heard has been afforded, and its right to have its day in Court has not been denied.

In the instant case the statute (Public Service Commissions Law, Sec. 66, subd. 2, *supra*) authorized the Commission to order reasonable extensions of gas mains, and, after a full hearing, the Commission determined that an extension of gas mains to Douglaston was such a reasonable extension and ordered the company to make it. The fullest possible opportunity was given to the company to show that the extension would be expensive and the return small and yet in view of all the facts the Commission made its order.

The certiorari proceeding in the Appellate Division

Not only did the Gas Company have its hearing before the Commission but under the New York Code provisions of Section 2140 (*supra*) a writ of certiorari was obtained (r. p. 5) and the Appellate Division of the Su-

preme Court, acting under a misapprehension as to the proper interpretation of Section 2140, reviewed the testimony and attempted to substitute its own conception of what was a reasonable extension for the Commission's determination.

The appeal to the Court of Appeals

The Court of Appeals, interpreting Section 66, subdivision 2, of the Public Service Commissions Law, and Section 2140 of the Code, held that the function of the courts was not to weigh the evidence anew but only to decide whether under the wording of Section 2140 of the Code the Public Service Commission had proceeded in a proper manner and reached a conclusion that might be supported by the evidence. The highest court of the State of New York held that it did not appear that the Commission's order was an arbitrary or capricious exercise of power and that the order could not be reversed by the courts under the procedure provided by Section 2140 of the Code (r. p. 282). It did not pass upon the constitutionality of the order but confined its action to correcting the error of the Appellate Division as to the scope of the court review of the Commission's order.

Since full hearings and the statutory court review were accorded to the gas company, its property, if taken by the authorities of the State of New York, was taken by "due process of law."

Vandalia R. R. Co. *v.* Public Service Commission of Indiana, 242 U. S. 255, 260
Bonner *v.* Gorman, 213 U. S. 86, 91
Central Land Co. *v.* Laidley, 159 U. S. 103
Bergemann *v.* Backer, 157 U. S. 655

Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 26
Murdoch *v.* City of Memphis, 20 Wall. 590
Guthrie, The Fourteenth Amendment, pp. 70-71

In view of the holding of the highest court of the State of New York that the extension ordered was such an extension as was contemplated by Section 66, subdivision 2 of the Public Service Commissions Law and that the statutory procedure had been followed by the Commission, this Court, in order to reverse the State Court, must find as a general rule of law that all extensions or improvements ordered by State Commissions that produce an immediate net return of only 2½ per cent. upon their cost are unlawful as constituting a taking of property without due process of law, and that no promise of future profits could ever justify the order. The cases are all opposed to such a startling suggestion.

Newark Natural Gas and Fuel Co. *v.* Newark, 242 U. S. 405, 408
Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 U. S. 1, 24, 26
San Diego Land etc. Co. *v.* Jasper, 189 U. S. 439, 442
St. Louis etc. R. Co. *v.* Gill, 156 U. S. 649

In *Atlantic Coast Line* v. *N. Car. Corp. Commission, supra,* it was contended that an order of the Railroad Commission requiring the operation of an additional train was unreasonable because such train could not be operated without pecuniary loss. In support of this contention *Smyth* v. *Ames,* 169 U. S., 466, was relied on. Mr.

Justice White in his opinion in distinguishing the principle laid down in *Smyth* v. *Ames* from the one under consideration said at page 24:

> "But this case does not involve the enforcement by a State of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety."

After pointing out instances in which the power to fix rates might result in orders in violation of the due process and equal protection clauses of the constitution the opinion continues at page 26:

> "Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the

hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth* v. *Ames* or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

POINT II

The alleged Federal question was not considered by the New York Courts and upon the record could not have been properly presented to them.

It is well settled that to give this court jurisdiction the Federal question must be real and substantial.

Parker *v.* McLain, 237 U. S. 469, 471

Consolidated Turnpike Co. *v.* Norfolk & O. V. R. Co., 228 U. S. 596
Deming *v.* Carlisle Packing Co., 226 U. S. 102, 105
Gring *v.* Ives, 222 U. S. 365
Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311
Hamblin *v.* Western Land Co., 147 U. S. 531, 532

It is equally well settled that the Federal question must have been claimed and denied in the lower courts. The record fails to disclose the clear raising of such a constitutional question and on the contrary clearly shows that the constitutional question of confiscation could not have been raised because essential facts were lacking.

Dewey *v.* DesMoines, 173 U. S. 193
Kipley *v.* Illinois, 170 U. S. 182
Levy *v.* Superior Court of San Francisco, 167 U. S. 175
Oxley Stave Co. *v.* Butler County, 166 U. S. 648

In paragraph IV of the plaintiff in error's petition for a writ of error (r. page 287) the last few lines read as follows:

> "The Federal questions above referred to appear in all of the said briefs in the petition for a rehearing before the said Public Service Commission (Record, fol. 111), and in the petition for a writ of certiorari to review the final order of the said Public Service Commission (Record, fol. 38)

and in the said motion for a re-argument before the Court of Appeals.

It is true that the question of confiscation was raised in the gas company's petition to the Public Service Commission for a rehearing upon the order of the Commission (r. page 37 fol. 111), but that was not equivalent to presenting the question to the courts. The question was presented to the courts of New York only upon the application for the writ of certiorari (r. p. 11), which application was granted, and upon the motion made to the Court of Appeals for a re-argument *after* that court had decided the cause in favor of the Commission.

As appears from the opinion of the Appellate Division (r. p. 274) and from the opinion of the Court of Appeals (r. p. 279) neither court expressly passed upon the constitutionality of the order. The lower court thought it had the right to hold the Commission's order unreasonable because it could not see a sufficient return upon the expenditure required. The higher court held that in this particular form of review (under Section 2140 of the New York Code) the question was "whether or not there was any evidence to show that the order of the public service commission was an unlawful and arbitrary exercise of power." It then held, admitting that the increased return to the gas company from the extended mains would be only $1,660 per year upon an expenditure of $60,000 to $70,000, or about 2½ per cent., that this was far from proving an arbitrary or capricious exercise of power (r. p. 282).

The record lacked the facts necessary to establish a case of taking property without due process of law.

A

While it appears that the outstanding capital stock of the gas company was $600,000 (r. p. 7), that its annual fixed charges in 1913 were $42,474.43 (r. p. 267), and its divisible surplus $20,845.76 (r. p. 267), *there is not a word in the record to indicate how great was the value of all the gas company's property devoted to public service.* Without this information it cannot be established that the order of the Commission constituted the taking of property without due process of law. The gas company may have been earning ten per cent. upon its capital invested in plant and distributing system and it might well have served Douglaston without any immediate return and yet have done no more than its duty to the territory it was incorporated to serve.

A public service corporation because of the public character of its business and in return for the privileges it has received must take the unprofitable part of its business with the profitable and is not entitled to assure to itself a profit from every section of its lines. It must take the lean with the fat and secure a reasonable return from the whole.

Russell *v.* Sebastian, 233 U. S. 195, 208
Consumers Co. v. Hatch, 224 U. S. 148
San Diego Land etc. Co. *v.* Jasper, 189 U. S. 439, 442
St. Louis etc. R. Co. *v.* Gill, 156 U. S. 649, 657

People ex rel. Woodhaven Gas Co. *v.* Deehan, 153 N. Y. 528

Lukrawka *v.* Spring Valley Water Co., 146 Pac. R. 640

B

The evidence showed that the estimated expenditure of $60,000 to $70,000 was not the cost of reaching the new consumers in Douglaston but was that cost *plus* the cost of providing a new backbone for the system by laying new or larger mains all through the five or six miles between the gas works in Flushing and the end of its existing mains at Bayside. To give good pressure according to the gas company's engineer, would require, because of the lack of capacity of the present system (r. p. 99) the supplementing of the entire six miles of mains. But it should be noted that when this new backbone is built the company will have prepared itself not only to serve Douglaston but to take care of an increased consumption *ten times* as great as Douglaston's (r. p. 164, fols. 490, 491). We concede the wisdom of thus preparing for the future, but when the argument is made by the plaintiff in error that his property is taken without due process of law the record should show how much of the $60,000 or $70,000 is properly chargeable to the order of the Commission to serve Douglaston and how much should be charged to provision for future growth. Nothing in this record so apportions the expense. The New York courts considered this question to ascertain what under all the circumstances was reasonable. If the mathematical test of five or six per cent. return on the investment is to be applied it is not unreasonable to insist upon knowing exactly what that

investment really is. Not knowing the value of the capital employed as a whole, or even the estimated cost of so much of the extension as is chargeable against Douglaston, it was manifestly impossible for the courts to pass intelligently upon a question of confiscation not properly raised by the record.

POINT III

The obvious reason for taking this cause to the Supreme Court is the advantage that will be gained by the Gas Company as a result of delay.

It is submitted that this writ of error has been sought as a means of postponing the expenditure required to construct the extension to Douglaston. It may be less expensive for the company to litigate than to build the extension. A long delay in the final disposition of this cause is as fatal to effective regulation as would be a denial of the Commission's right to make the order.

CONCLUSION

This Court is without jurisdiction to consider this cause since no substantial Federal question is involved or was decided by the state courts, and the writ of error was taken for the purpose of delay.

The Writ of Error should be dismissed or the Judgment of the Supreme Court of New York affirmed.

Dated April 20, 1917

GEORGE S. COLEMAN
ARTHUR DUBOIS
Of Counsel for Defendants in Error

10

FILED
NOV 6 1917
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1917

No. 407

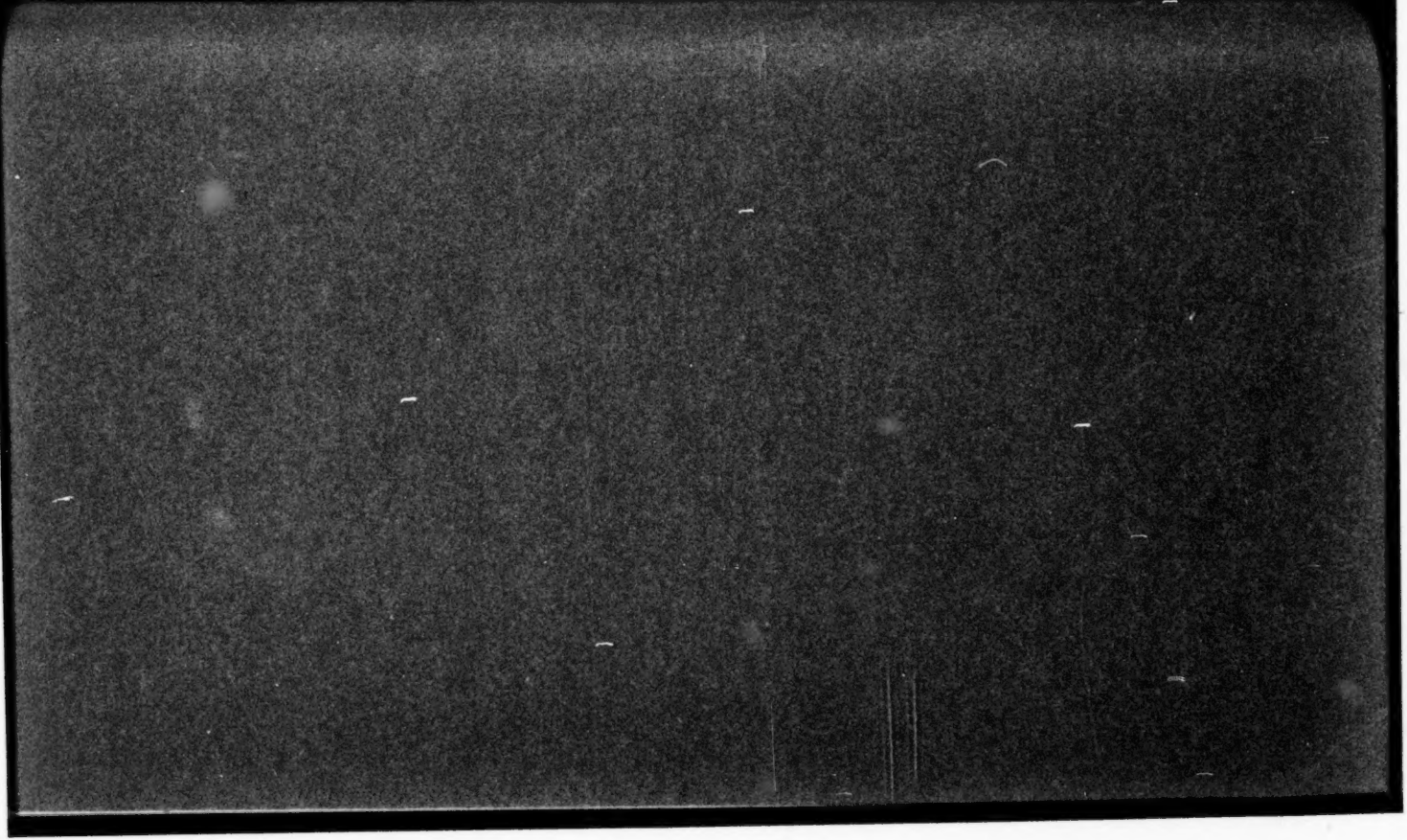
THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in Error,

vs.

EDWARD E. McCALL, *et al.*, COMMISSIONERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

WILLIAM L. RANSOM,
GODFREY GOLDMARK,
GEORGE S. HOVEY,
Counsel for Defendants in Error.



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Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY, Plaintiffs in Error *against* EDWARD E. MCCALL, *et al.*, Commissioners, constituting the Public Service Commission of the State of New York for the First District, Defendants in Error	October Term, 1917 No. 407

BRIEF FOR DEFENDANTS IN ERROR

This case has been brought to this court by a writ of error from the Supreme Court of the State of New York after the Court of Appeals, the highest court of that State, unanimously affirmed an order of the Public Service Commission for the First District and reversed an order of the Appellate Division of the Supreme Court which had theretofore annulled the Commission's order.

This order of the Commission directed the New York and Queens Gas Company to construct an extension of its gas mains so as to reasonably serve with gas the community in that part of the Third Ward of the Borough of Queens in New York City known as Douglaston and Doug-

las Manor (R. p. 19-20). The Company's charter authorizes it to serve the whole borough, it owns secondary franchises for the entire Third Ward, and has a monopoly of the right to supply gas in that ward. It is now operating in that Ward. The order was made under Section 66, Subd. 2, of the Public Service Commissions Law, State of New York (Laws 1910, Chap. 480), which reads as follows:

> "§ 66. GENERAL POWERS OF COMMISSIONS IN RESPECT TO GAS AND ELECTRICITY. Each Commission shall within its jurisdiction:
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> "2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, *and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities.*"

The order of the Commission was reviewed in the State courts by writ of certiorari under the Code of Civil Procedure, which provides, in Section 2140, that the following questions involving the merits are to be considered upon the hearing:

"ARTICLE SEVENTH. THE WRIT OF CERTIORARI, TO REVIEW THE DETERMINATION OF AN INFERIOR TRIBUNAL.

* * * * * * *

"§ 2140. QUESTIONS TO BE DETERMINED.

"The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

"1. Whether the body or officer had jurisdiction of the subject matter of the determination under review.

"2. Whether the authority, conferred upon the body or officer, in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

"3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

"4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

"5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence."

The Appellate Division of the State Supreme Court before which, under the State practice, the writ of certiorari was returnable, undertook to pass upon the wisdom and expediency of the Commission's order and, substituting its own judgment for that of the expert administrative tribunal, annulled the order (R. pp. 276-280). Upon the

Commission's appeal to the Court of Appeals this order of the Appellate Division was unanimously reversed and the Commission's order affirmed. The Court of Appeals said (R. p. 280):

> "In applying the provisions of this statute the court at the Appellate Division said: 'We have no doubt that under this law the question remains for the court to determine upon the review of the determination of the Public Service Commission whether the extension ordered was a reasonable extension.'
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> "This statement of the law is quite likely to create a misapprehension as to the power of the court. The court has no power to substitute its own judgment of what is reasonable in place of the determination of the public service commission, and it can only annul the order of the commission for the violation of some rule of law.
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> "The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in the conduct of their business and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed perhaps by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and

protect the constitutional rights of the corporations over which they were given control.

"The law governing the commissions is well expressed by the Minnesota Supreme Court in State v. Great Northern Ry. Co. (153 N. W. Rep. 247). It is there said: 'The order may be vacated as unreasonable if it is contrary to some provision of the federal or state constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if having regard to the interests of both the public and the carrier it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment.' (See also, *People ex rel. Town of Hempstead v. State Board of Tax Comm'rs,* 214 N. Y., 594; *People ex rel. Morrissey v. Waldo,* 212 N. Y., 174.)

"In *Interstate Commerce Com'n v. Illinois Central R. R. Co.* (215 U. S., 452, 470), the chief judge, after stating the power of the court, continued: 'It is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it, is the question.'

* * * * * * * *

"The court at the Appellate Division did not, therefore, have the power to determine that the extension of the relator's gas mains and pipes ordered by the public service commission was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreason-

able if it was an unlawful, arbitrary or capricious exercise of power."

Upon the merits the court said (R. p. 282):

"There was no dispute as to the basic facts of the case. There was some variation in the estimates of the witnesses as to the cost of iron pipe and the expense of engineering supervision and like matters, but there was no real disagreement as to the cost of the extension of the relator's system of gas distribution, and the increase in revenue that the relator would probably receive therefrom.

"The court at the Appellate Division in its opinion summed up the proof on the subject. The court said that the cost of the extension would be between $60,000 and $70,000, and that the increased return to the relator from the consumption of gas would be about $1,660 per year, which is only one-half of the interest at five per cent upon the extension.

"This is very far from showing that the order of the public service commission was simply an arbitrary and capricious exercise of power. Indeed it was not asserted to be so by the court. The court in annulling the order claimed and exercised the right to review the action of the public service commission and pass generally upon its wisdom and expediency.

"In Douglaston and the neighboring territory in the third ward of the borough of Queens covered by the relator's franchise, there are some 332 houses. The occupants of these houses can get no gas unless they are supplied by the relator. It is the duty of the relator to supply their needs if practicable. (*Wisconsin, M. & P. R. R. v. Jacobson*, 179 U. S., 287; *People ex rel. Woodhaven Gas Light Co. v. Deehan*, 153 N. Y., 528.) The cost of

the extension is not the only matter for consideration. (*Oregon R. R. & N. Co. v. Fairchild,* 224 U. S., 510, 529.)

In sustaining the order of the Commission the Court of Appeals necessarily held that Section 66 of the Public Service Commissions Law empowered the Commission to order, and imposed upon the company the duty to make reasonable extensions within its franchise area, and that the only function of the State court upon a review by certiorari under the Code of Civil Procedure was (R. p. 280) to keep the Commission within the law and protect the constitutional rights of the corporations over which they were given control. This construction of the State statutes by the highest court is considered a part of the statutes and is accepted and followed in this court.

Chesapeake & Ohio Ry. Co. v. *Public Service Commission of W. Va.,* 242 U. S., 603, 605;
Portland Ry. L't. & P. Co. v. *Ore. R. R. Com.,* 229 U. S., 397, 407;
Smiley v. *Kansas,* 196 U. S., 447, 455;
Gatewood v. *N. C.,* 203 U. S., 531, 541.

FIRST

The Single Assignment of Error

No error is assigned that the above provisions of the Public Service Commissions Law and of the State Code of Procedure so construed deprive the Company of property without due process of law, the single assignment of error being directed to the order of the Commission through which in the present case, and upon its particular

facts, the Commission exercised the power vested in it by the State.

The single assignment of error (R., p. 289) on which the plaintiff in error relies, reads as follows:

> "That the order of the Public Service Commission of the State of New York for the First District, made March 19, 1915, was illegal and void, in that it deprived the above-named New York and Queens Gas Company of its property, without due process of law, and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the said Company to extend its distributing system, under great physical difficulties and at enormous expense, to an independent and remote community which the said Company was under no present duty to supply with gas, where it appeared that the said Gas Company would not obtain an adequate return upon the expenditure required to make such extension."

An examination of this assignment of error shows how very narrow is the question indicated. Due process of law is alleged to have been denied for two reasons: (1) That the Commission's order would require the company to extend its distributing system under great physical difficulties to an independent and remote community which the company was under no present duty to supply with gas, and (2) that it appeared that the company would not obtain an adequate return upon the expenditure required to make such extension.

SECOND

Statement of Facts as to Public Demand and Necessity, Cost and Return

The New York and Queens Gas Company is a gas corporation which is authorized by its charter (R., p. 7) to manufacture and supply gas for lighting streets and public and private buildings in the Borough of Queens, in the City of New York. The company owns secondary franchises granted by municipal authorities for the entire Third Ward of that borough (R., pp. 8 and 9, and Fol. 410). It has a monopoly of the right to supply gas in that ward. Douglaston and Douglas Manor lie within the Third Ward (R., Fols. 26, 336).

PUBLIC DEMAND AND NECESSITY.

The company's distribution mains now extend through the Third Ward from Flushing, where its plant is situated, to Bayside, which is only one and one-half miles from the residences in Douglaston which are to be supplied. Between Bayside and Douglaston lie Alley Creek and the meadows adjoining the banks of the creek. Douglaston and Douglas Manor are already served by other franchise holding utilities—electric light, telephone, telegraph, water, trolley and railroad (R., fols. 65, 201, 272). Before making the order the Commission held numerous hearings at which the company was represented by counsel, cross-examined witnesses in support of the application and produced evidence in its own behalf. The Commission obtained complete information on the needs of the locality and the cost of installing the service. There were petitions signed by residents who agreed to consume gas in

their houses provided the company brought gas to their houses (R., Fols. 194-195), and a part of the territory had been canvassed and all had agreed to take gas (R., Fol. 265). The Court of Appeals pointed out that they can get no gas unless supplied by the company. Maps were produced showing the location of every house in the territory to be served (R., p. 62), and the estimated cost of each house was given (Exhibit 2, R., p. 257). In the summer of 1914 there were some 332 houses in this locality (R., Fol. 305) and others under construction. The number has doubled in six years and the community is still susceptible of growing to five times its present size (R., Fol. 206). There were a great many instances where people absolutely refused to buy property because there was no gas (R., Fols. 192, 519). The cost of several of the houses was higher than $20,000, and the cost of the average house in Douglaston was about $7,750 (Exhibit 2, R., p. 257). Practically all the householders resided there all the year round (R., Fols. 183, 189, 190, 216, 221), and would use gas for that period (R., Fol. 190).

While most of the houses are not piped for gas (the end of the company's main being at Bayside, a mile and a half distant), there was abundant testimony that people would substitute gas ranges for coal ranges if they could (R., Fols. 214, 222). Furthermore, some of the houses are piped (R., Fol. 270) and as to some others the plans were drawn with the provision for installation of gas ranges, and were so arranged that the pipes could be installed at very little expense to the owners (R., Fol. 269). It appears that most of the people in the locality have become accustomed to gas ranges while living in apartments and prefer them for that reason (R., Fol. 191).

As the locality is already served with electric light, it was natural that gas was demanded, chiefly for cooking. There was testimony that a few would use it for lighting (R., Fol. 194), and it would to some extent be used for gas logs (R., Fols. 213, 214) and for heating (R., Fol. 268), and hot water heaters (R., Fol. 210), in addition to its use for cooking. A builder testified that new houses would have no coal ranges (R., Fol. 214). It is, of course, a matter of common knowledge that in large communities electricity is taking the place of gas for lighting purposes, and that gas in turn is taking the place of coal for cooking, and in many instances for heating, so that the purposes for which gas was to be used in Douglaston was no different from the purposes elsewhere in the City of New York. And, of course, the householders would be willing to substitute gas for coal, as has been done elsewhere. The expert Commission certainly knew the relative importance of the two sources of income.

COST

The Commission also had before it full evidence as to the cost of making the extension. The engineer of the Commission estimated the cost at $61,004.80, which included a five per cent. allowance for engineering and superintendence. This estimate was not only the cost of extending the main from its terminus at Bayside to Douglaston, but was that cost plus the cost of an additional high pressure 4-inch main from the works at Flushing to Broadway and Sanford Street, Flushing (R. Fol. 340), and of a new high pressure 6-inch main on Broadway (where high pressure gas mains had never been laid) to Main Avenue, Douglaston. The additional high pressure 4-inch main was neces-

sary because of the lack of capacity of the present system (R. p. 99). If the company in extending its mains from Flushing to serve Bayside had considered its duty of providing a main adequate for future growth of its franchise territory, the entire Third Ward of the Borough, the present extension would only be from Bayside to Douglaston without the need for the laying of the additional 4-inch high pressure main. The Commission's engineer testified that a 4-inch main would be ample to take care of three or four times the houses in Douglaston and that a 6-inch main would supply ten times that number, and that the latter was the better from an engineering standpoint (R. Fol. 491). The company's manufacturing plant is of ample size to supply the additional territory. It was conceded that the intermediate territory was growing and that houses were being built all the time (R. Fol. 36).

The fact that the engineers both for the Commission and for the company agreed that if the extension was made it should provide for a possible increase of 1,000 per cent. in consumption (R. Fol. 490), does not indicate a belief by the company that a profitable future was remote. The additional high pressure main between Flushing and Bayside, necessary to serve Douglaston, was ample to take care of the future growth of adjoining territory and was the size suggested by the company itself. The only difference in the estimated cost of construction between the engineers of the Commission and those of the company was the percentage for engineering, superintendence and similar matters and a slight difference in the cost of pipe. The State courts found the cost to be between $60,000 and $70,000 (R. p. 282). Because of the slight additional difficulty of crossing Alley Creek,

the company's engineer allowed an additional $1,000 (R. p. 266), and the Commission's engineer an additional $2,000 (R. Fols. 498, 806).

RETURN

The company estimated the total annual consumption to be about 6,000,000 (R. p. 266) cubic feet, or about an average monthly bill per house of $1.66. A real estate broker resident in Douglaston estimated the monthly bill at about $2.50 to $3.00 (R. Fol. 208). Upon the basis of the company's estimate the Commission's engineer estimated the return to be about 2.72% if the entire cost of the high pressure mains be charged to the extension. The Commission found that the entire cost of the new high pressure mains should not be charged to the Douglaston extension, because the backbone of the system was inadequate and incapable of being extended in a natural manner to new territory, and that if not so charged the return would be about 3½ to 4 per cent. (R. p. 35). The company showed that its outstanding capital stock is $600,000 (R. P. 7).

Upon the basis of its annual report for 1913 (Exhibit No. 4, Fols. 799-801) the company shows a divisible surplus for the whole business of $20,845.76 after payment of all fixed charges. This divisible surplus is 9.45 cents per 1,000 cubic feet of gas sold (Fol. 801). This divisible surplus of 9.45 cents is then multiplied by its own estimated total consumption of 6,075,000 cubic feet and the resulting figure is called "*profit at .0945 per M*—$574.09 or 8/10% *on total investment*" (Exhibit 3, Fol. 797).

This is seriously misleading, for $0.0945 per 1,000 cubic feet of gas is in fact the *divisible surplus* per 1,000 feet

after deducting fixed charges of $42,474.43 (Fols. 799-801); and while, for the extension, this divisible surplus is estimated at $574.09 per annum, that sum is available as a return or profit, not on the $66,731.69 given by the company as an estimate of total cost of the extension (Fol. 797), but upon such total cost *less the amount of bonds or other obligations chargeable to such extension.* In other words it is the profit remaining after all fixed charges, including interest on borrowed money, are paid. But, of course, the return must be computed on the total investment in the extension, whether it be the company's own capital or borrowed capital.

Although the company had every opportunity to present such evidence as it deemed material (R. Fol. 647) *no testimony was offered to show the fair value of all the property employed by the company in the public service, and no testimony was offered to show what return was earned upon such investment. Nor was there testimony that as a result of the expenditure the company would not earn fair return upon its entire investment. The fact that the company does not pay dividends proves nothing in the absence of proof of inability to pay such dividends and of proof that the outstanding stock does not exceed the fair value of the property.*

Without proof as to the fair value of the property employed in the public service and the return being earned upon such property, it cannot be assumed that the company would receive less than a fair return upon all its property including the extension, although the return from the extension itself might at the start be only 2½ to 3 per cent.

THE COMPANY'S OFFER TO CONSTRUCT

It is important to note that the company had offered to make the extension and afford the service, if the property owners would deposit $10,000, *such deposit to be repaid at the rate of* 25 *per cent. on the gas bills in each year until the whole sum was repaid to the depositors* (R. Fol 327).

THIRD

Douglaston and Douglas Manor Were Not Independent and Remote and the Physical Difficulties Attending the Construction Were Not Great

Perhaps no better comment can be made upon this portion of the assignment of error than is afforded by the fact that the company offered to make the extension if the property owners would band together and deposit $10,000 to be repaid at the rate of 25 per cent. of the gas bills in each year until the whole sum was repaid to the depositors (R. Fol. 327). The community was not so "independent and remote" and the "physical difficulties" were not so "great" nor the expense so "enormous" that the company would have been unwilling to live up to what the New York Court of Appeals has held to be its "duty" if the home owners had acquiesced in its suggestion that they temporarily deposit the comparatively insignificant sum of $10,000 with the company to be repaid as money came from gas bills.

Douglaston and Douglas Manor, to which the order relates, are within the limits of the City of New York as well as within the area for which the company accepted both

primary and secondary franchises. The area is already served by all other modern conveniences, a general demand for gas was shown, and the mere fact that there may be a small creek and marsh intervening between them and Bayside certainly cannot make it appear that they are independent and remote. Both were there when the franchise to serve this territory was applied for and granted. As the Court of Appeals pointed out (R. p. 282), the occupants of these houses can get no gas unless they are supplied by the relator. How much merit there is in the claim that there were great physical difficulties to be overcome appears not only from the company's offer to build the entire extension upon a temporary deposit of $10,000, but also from the fact that the company's own engineer, in making his estimate of the expense, allowed (R. p. 266) only the paltry sum of $1,000 for the additional expense of crossing the creek and the Commission's engineer allowed out of his total estimate of $61,000 only the sum of $2,000 (R. Fol. 498).

In *Van Dyke* v. *Geary*, 244 U. S., 39, 49, this court, after reviewing the evidence, said:

> "We cannot say that it was impossible for a fair-minded board to come to the result that was reached."

Applying the same standard here it must result in the conclusion that it was not impossible for the Commission to determine that the extension was reasonable and necessary, that the difficulties and expense were not great and that Douglaston and Douglas Manor had so developed in the past and would so develop in the future as to entitle them to service from the company which had undertaken to serve them, and which was not otherwise obtainable. In

fact the undisputed evidence could not lead to any other conclusion. A denial of the application would have meant that a franchise holding corporation may "pick the fat and leave the lean."

This court does not sit to retry the issues of fact heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject and supported by competent testimony (*Portland R. R. Co.* v. *Ore. R. R. Com.*, 229 U. S. 397, 412); and it will not substitute its judgment with respect to what is reasonable for that of the Public Service Commission exercising its delegated power (*Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 313). If the public necessity for the extension is shown, this court will not inquire into the wisdom or expediency of the means adopted to secure it (*Atlantic Coast Line R. R. Co.* v. *Ga.*, 234, U. S. 280, 288; *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.*, 206 U. S. 1, 23). Of course, if, as in *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 531, 532, there is no evidence whatever warranting a finding that there was any public necessity for the expenditure, this court will hold the Commission's order a mere fiat and arbitrary and confiscatory, but that the record here contains no evidence of public necessity and demand cannot be seriously urged.

FOURTH

The Fact that the Company will not from the Start obtain a Return of Six Per Cent upon the Extension does not render the Commission's Order Confiscatory

In the absence of evidence as to the fair value of the entire property of the company used in the public service and the rate of return thereon, and in the absence of evidence that the expenditure for the extension would so increase the total value of the property without commensurate increase in its earnings as to result in less than a fair return on the entire property, including the extension, there is no basis presented for review of the determination of the State court that the extension was reasonable and in lawful fulfillment of franchise obligations.

The necessary basis of this court's consideration of the confiscatory character of an order for additional service by a public utility has been clearly set forth in *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.*, 206 U. S. 1, 26, 27, where an order was attacked on the ground that the additional facility would not itself afford an adequate return on the outlay. In support of this contention *Smyth* v. *Ames*, 169 U. S. 466, was relied upon. In distinguishing that case, Mr. Justice White pointed out the difference between rate orders and service orders:

> "But this case does not involve the enforcement by a State of a general scheme of maximum rates, but only whether an exercise of State authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount

to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety."

After pointing out instances in which the power to fix rates might result in orders in violation of the due process and equal protection clauses of the Constitution the opinion continues at page 26:

"Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypothesis which we have states is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as

> would be the case where the whole scheme of rates was unreasonable under the doctrine of Smyth *v.* Ames or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

It appears, therefore, that a schedule of rates which will not produce an adequate return upon all capital employed in the public service, demonstrates on its face its unreasonableness, but the unreasonableness of an extension is not demonstrated by showing that the return on the expenditure for that extension will not be adequate at the start.

In *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission of W. Va.*, 242 *U. S.*, 603, it appeared that an order of the State Commission required the company to operate passenger service on a branch line which had never been used for that service, and which for years had been used for freight traffic only. The act under which the company was granted the right to construct the branch declared that it should be a public highway free to all persons for the transportation of their persons and property. The opinion of the State court (75 *W. Va.*, 100) showed that the return from the passenger service on the branch for

the first year would be about 2 per cent. This court in upholding the Commission's order said:

> "Isolatedly considered, such a passenger service would not presently be remunerative but would entail a pecuniary loss, and how long this would continue to be true can only be conjectured. But beyond this the effect from a revenue standpoint of installing such a service is not shown. It does not appear either that the company's intrastate passenger business in that State would not yield a reasonable return, or that the traffic, freight and passenger, passing over the branch line to and from points on the main line would not do so.
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> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss (*Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206, U. S., 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S., 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S., 510, 529; *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S., 220, 229). That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being

> rendered, are also to be considered (Cases, *supra*). Applying these criteria to the order in question, we think it is not shown to be unreasonable."

In *Mississippi R. R. Comn.* v. *Mobile & Ohio R. R. Co.,* 244 U. S., 388, this court held to be unreasonable an order of the State Commission requiring the company to operate certain specified trains where it appeared that as a result of the operation the company would not earn an adequate return upon its *entire investment.* The court recognized the doctrine of the Atlantic Coast Line case, but had before it complete evidence not only as to the loss resulting from the operation of particular trains, but as to the entire financial affairs of the company. With all this information before it the court said:

> "If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, it passes beyond lawful bounds, and such action is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States."

The conclusion that the return from the entire investment must be considered is also reached in the following cases:

Puget Sound Traction Co. v. *Reynolds,* 244 U. S., 574, 580;

Chicago, B. & Q. R. R. Co. v. *Wisconsin R. R. Commission,* 237 U. S., 220, 229;

Oregon R. R. & N. Co. v. *Fairchild,* 224 U. S., 510, 529;

Missouri Pac. Ry. Co. v. *Kansas,* 216 U. S., 262, 279;

Minneapolis & St. L. Ry. Co. v. *Minnesota,* 186 U. S., 257, 267;
Wisconsin etc. R. R. v. *Jacobson,* 179 U. S., 287;
St. Louis & San Francisco Ry. Co. v. *Gill,* 156 U. S., 649, 665;
St. John v. *Erie Ry. Co.,* 22 Wall., 136, 149.

From these cases the general principle may be deduced that where it is otherwise reasonable to afford a facility the return upon all property employed in the service must be considered, and mere incidental loss resulting from the furnishing of the particular facility found by a commission to be necessary will not of itself render an order confiscatory, and the expenditure will only be one element which the court will consider in determining whether the order violates constitutional rights.

THE NATURE OF THE GAS COMPANY'S DUTY.

The plaintiff in error while conceding the rule in the foregoing cases attempts to distinguish them from the one at bar by contending that they are predicated upon the existence of "present duty" to serve, whereas in the instant case there was no present duty to furnish gas to that part of its franchise territory lying within Douglaston and Douglas Manor. The distinction, however, sought to be made does not exist and the use of the term "present duty" simply confuses the underlying principle. In *each* class of cases there is a general duty to furnish reasonable facilities because of obligations which have been assumed. As said by Mr. Justice Peckham in the *Atlantic Coast Line* v. *Wharton,* 207 U. S., 328, 335:

> "The term 'adequate or reasonable facilities' is not in its nature capable of exact distinction. It

> is a relative expression and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for and to all other facts which would have a bearing upon the question of convenience and cost."

The facts in each class of cases must be examined to the extent of determining whether there is *any basis* for the holding that public necessity or convenience required either the carrier or public utility to furnish the additional facility. In each case the question of expense is only one element and must be considered in connection with the nature and productiveness of the corporate business as a whole (*Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S., 510).

The nature of the duty assumed by a gas corporation which has accepted a franchise to serve a particular territory has been determined in numerous cases. In the present case the Court of Appeals held that "it is the duty of the relator to supply their needs if practicable."

In *Russell* v. *Sebastian*, 233 U. S., 195, this court had under consideration the right of a gas company to extend its mains through streets which it had not previously occupied under a provision of the California State constitution in effect at the time the company was organized and which permitted it to use the public streets and thoroughfares for the laying of its pipes and conduits under reasonable regulations. A subsequent ordinance of the City of Los Angeles passed pursuant to a constitutional amendment required that permission to lay the mains be obtained from the municipal authorities. The company claimed that the later constitutional provision and the ordinance

impaired its contractual right in that having laid its mains in some of the streets its right to extend them to others within its franchise territory could not be impaired by subsequent action of the State. This court held the contention sound because the extent of the right acquired under the earlier constitutional provision was to be determined and measured by the co-relative duty which the company assumed to the entire territory which it had undertaken to serve when it laid mains in some of the streets. This duty the court held was to extend its mains so as to meet the reasonable requirements of the entire community. This court said:

> "This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the State's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the State's offer was the obligation to provide facilities that were reasonably adequate. *Lumbard* v. *Stearns,* 4 Cush., 60; *Cumberland Tel. Co.* v. *Kelly,* 160 Fed. Rep., 316, 324; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corp. Com'n,* 206 U. S., 1, 27; *People* ex rel. *Woodhaven Gas. Co.* v. *Deehan,* 153 N. Y., 528, 533; Morawetz on Corporations, §1129. It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.

> "In *People* ex rel. *Woodhaven Gas Co. v. Deehan, supra* (approved in *Illinois Central R. R. Co.* v. *Chicago,* 176 U. S., 646, 666), a grant of authority to lay conduits for conveying gas through the streets of a town, so as to render service to the people of the town, was held to extend as a property right not only to the streets then existing, but to those subsequently opened. The court said (p. 533): '*It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way.* The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old.'"

It is important to note that two of the cases cited by Mr. Justice Hughes to support the holding that it was the company's duty to serve the entire community were *Atlantic Coast Line Ry. Co.* v. *N. C. Corp. Com.,* 206 *U. S.* 1, and *Peo.* ex rel. *Woodhaven Gas Co.* v. *Deehan,* 153

N. Y., 528, both of which cases the plaintiff in error has urged are not applicable to the case at bar.

After the decision in *Russell* v. *Sebastian,* the Supreme Court of California thoroughly considered the question of the duty of a public utility company to extend its services. *Lukrawka* v. *Spring Valley Water Co.,* 169 *Cal.,* 318. There the court said:

> "It was for the benefit of the public that the franchise was extended to secure to the municipality of the city and county of San Francisco and its inhabitants an adequate supply of water as the reasonable and necessary wants of the community in that respect might require. This was the purpose and this the condition upon which the franchise was offered, and when it was accepted by the respondent it constituted a contract between the state and the respondent under which the right duties and responsibilities of each were fixed, and by which they were bound. The franchise was offered by the state as an entirety, and, where a corporation organizing under the act offering it undertook the public duty which such franchise contemplated of supplying water to a municipality and its inhabitants, it accepts the franchise in its entirety. It was a community service which was contemplated by the extension of the franchise, and which was intended should be assumed by a corporation accepting it, and it was solely that this assumed duty might be properly and entirely discharged that an easement over all the streets of the municipality was granted with the franchise. The franchise was not offered, nor could it be accepted, with any limitation as to the area to be fixed by the corporation organized under the act within which in the municipality it would furnish water to its inhabitants. *It was intended that the public duty*

assumed should be discharged for the benefit of the municipality and its inhabitants as a community; that when a water company organized under the act undertook to furnish water to the inhabitants of a city it should be charged with the obligation of taking adequate measures to supply the reasonable needs and wants of all the inhabitants as they arose. The proper discharge of this public duty required not only that the company should provide a supply of water and establish a system for its distribution to meet the reasonable needs of the municipal community as it then existed, but it was under the obligation to keep in view the prospective and probable increase in population of the municipality and the necessarily increasing demand for a water supply which would be consequent therefrom; to anticipate the natural growth of the municipality it had undertaken to serve as a whole; and to take reasonable measures to have under its control a sufficient supply of water and make gradual extensions of its distributive system to meet the reasonable demands for water by the growing community."

These cases have been followed generally by the State commissions:

> See Matter of the Practices of Water, Gas, Electric and Telephone Utilities (California Commission), P. U. R., 1915, E. 717, 747; City of St. Joseph *v.* St. Joseph Gas Co. (Missouri Commission), P. U. R., 1916, E. 204.

Wyman on Public Service Corporations, speaking of the question of extensions, says:

> "Sec. 281. Obligation to the community.
>
> "It is obvious that the problems raised in this

topic have not been disposed of as yet. It is plain that the existing facilities must in many instances be further developed in readiness to give service to those beyond the present lines, since what has really been undertaken is the proper service of the whole community dependent upon the established company. This at least involves the well-settled central territory within which service is plainly demanded, whether mains have been laid in all the streets or not. Certainly all premises situated within the network of the existing mains and within convenient connecting distance of their lines should be served. All of these premises come within the sphere of influence, already established, differing slightly from premises abutting. *But the law will soon require, if it does not already, that the existing mains must be gradually extended as the growth of population in the community which the corporation has undertaken to serve demands the expansion.*"

"Sec. 797. Facilities which the service requires.

"In most of the public employments of the modern type what is undertaken is not merely the devoting of particular equipment to public use but rather the rendering of a certain service to the community with which it professes to deal. Thus a modern railroad plainly undertakes general transportation along its route; and since it has professed this general service it must see to it that it has sufficient equipment to handle the business which it has in effect invited by this general profession. The term adequate facilities is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had among others things, to the extent of the demand for transportation and the cost of furnish-

ing the additional accommodations asked for. All this is particularly true of the municipal services —such as waterworks, gas plants, electric plants, and telephone systems. *There are sufficient authorities, most of which have been discussed elsewhere, to the effect that their obligation to give service is not confined to the original pipes which have been laid, or wires which have been strung. Such companies are held to undertake the service to their communities; and they must, to speak in general, be prepared to extend this system throughout their district to meet the reasonable demands of the growing community. If this involves the acquisition of new sources of supply, or a laying of pipes in new streets, or extension of wires to other streets or the construction of new exchanges, all these new facilities must be provided to meet the expansion of the business within the community to the service of which the company has committed itself.* But it is true of such supply as it is of other public service that the duty to give adequate service to those to whom it owes this primary duty is relative, not absolute. The service company will be held to the exercise of due foresight in anticipating the progress of the demand for its supply accompanying the growth of the community. But it will not be liable if the unexpected happens in the shape of an unforeseen demand for which its existing supply is inadequate."

From these authorities it appears that there is no distinction between the general duty of a carrier to provide adequate facilities to the territory which it has undertaken to serve, and the general duty of a gas company to adequately serve the territory for which it has obtained a franchise where in each case public necessity shows that

the service is reasonably required. In each case it is a present general duty, and as the plaintiff in error has accepted franchises to serve the entire Third Ward of the Borough of Queens, New York City, it is as the Court of Appeals has said, its duty to serve this territory if practicable. As the present Chief Justice said in *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262:

> "To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed even though such duties were the absolute correlative of the rights conferred."

The company elected to accept franchises for the entire Third Ward, which includes Douglaston and Douglas Manor. It was in its power to limit the area in which it could not be compelled to extend its mains. As it has secured the benefit arising from its pre-emption of that territory it must recognize the accompanying obligation.

It may be conceded that it is entirely a question of internal business management and one lying within the discretion of the directors whether the company should apply for a new franchise to enter new territory or whether it should confine its operation to its franchise area, and that under such circumstances the company could not be compelled to make the application and extend its mains. But that question is different from the one here involved. The very nature of the subject of franchises for supplying gas, light or water to a particular territory presupposes that the grantee of the franchises will at the beginning occupy

but a portion of the area in which the franchise is to operate, and later, with growth and expansion of the territory, will occupy the whole area.

The company was ready and willing to build this extension and furnish gas to Douglaston if the residents would advance the sum of ten thousand dollars, to be returned by allowing the contributors twenty-five per cent. of the amount of their bills until the advance had been repaid. The advance of this sum, or even its gift outright, would not have secured the Company a net return of six per cent. on its total estimated cost of the extension, nor would the extension under these conditions have improved the financial condition of the company on its entire business, and yet, in the long run, the company must have seen a profit in the business to be obtained from the construction or it would not have made the offer.

It is common knowledge that enterprises of this kind suffer losses until their business is fully developed, and the courts of New York have determined that in fixing rates there must be included in the property upon which the company is entitled to a return an amount representing "going value." The Court of Appeals of New York, in *People* ex rel. *Kings County Lighting Co.* v. *Public Service Commission,* 210 N. Y. 479, held that it was the duty of the Commission in determining the fair value of property employed in the public service to make a separate allowance for "going value" representing pioneer losses in developing the corporate enterprise. The Court of Appeals in that case said:

> "If the shareholders have been deprived of a fair return on their investment because of the time and expense reasonably and properly required to build

up the business, they have, to the extent of that deprivation, added to their original investment and are entitled to a return upon it. If, however, a fair return in addition to the expense of building up the business has been earned from the start, the public, not the shareholders, have paid the development expenses.

* * * * * * *

"The fair return is to be computed on the actual investment, not on an over issue of securities, and the failure to pay dividends to the investors must be due to the causes under consideration, not to an accumulation of a surplus or to expenditures for permanent additions or betterments, which are included in the appraisal of the physical property; in other words, the actual net earnings are to be taken. Making proper allowance for the matters just considered and perhaps for others which do not now occur to me, I define 'going value' for rate purposes as involved in this case to be the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property."

If as a result of complying with its franchise obligations and the order of the Commission the company's present rates would become insufficient to yield a fair return upon all its property employed, both tangible and intangible, still the gas company will not be deprived of any property right either in its investment or in a return upon such investment, for then the company has the right to have the rates fixed at a reasonable amount as will give it a fair return. The wisdom or expediency of in-

creasing the rates throughout the entire franchise territory in order that a part may not go without service presents no federal question, but is a matter of public policy to be determined solely by the State. The State has empowered the Commission to order reasonable extensions and the State must allow such rates as will yield a fair return upon the entire property employed in the service. This is accomplished either by an increase of rates as soon as the extension is in service or if the rates are not immediately increased then by the allowance thereafter of "going value" as an asset upon which a return must be allowed. Under either method the company suffers no loss from the required expenditure. Of course, an extension which would force the fixing of a rate, in order to yield a fair return, in excess of the value of the service (*Smyth* v. *Ames,* 169 U. S., 466, 544) would have such an element of unreasonableness that the Commission would determine the extension itself to be unreasonable. But such a hypothesis is not justified by the facts in this case. There is no evidence here that a fair return on the entire property would not be earned at *present* rates when the extension is built and placed in service and on no theory, therefore, can the Commission's order be deemed unreasonable or confiscatory.

THE COMPANY HAS SECONDARY FRANCHISES FROM MUNICIPAL AUTHORITIES

The argument that there is no duty to serve Douglaston and Douglas Manor because the company has no secondary franchises or consents from municipal authorities and under the provisions of Section 61 of the Transportation Corporations Law the company requires such consent

before mains can be extended, has no basis. The question is concluded by the determination of the Court of Appeals that it was the company's "duty" to extend its mains. It is one of construction of State statutes, is not a Federal question, and was not raised by assignment or error. It was not even raised before the Commission. On the contrary, before the Commission (R. Fol. 410) and on the argument (R., Fol. 681) the company conceded that it had franchises for the entire Third Ward. In its petition for the writ of certiorari it alleged that its charter from the State authorized it to serve the entire Borough of Queens (Fol. 21) and that it acquired a plant in Flushing in the Third Ward, and that it "acquired various consents to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways *of said ward* granted to various individuals and corporations by the former municipal authorities having jurisdiction so to do prior to the consolidation of the said Third Ward into and as a part of the City of New York (R. Fol. 23) and (Fol. 26) it alleged that the company is engaged in the sale of gas for public and private purposes in various portions of the Third Ward and has from time to time extended, enlarged and improved its distributing system. These allegations, not being denied by the Commission's return to the writ, are deemed to be admitted, and, under the State practice, are to be considered upon a determination of the merits. *People* ex rel. *Lester* v. *Eno*, 176 N. Y., 513, 518 *People* ex rel. *Brockport* v. *Sutphin*, 166 N. Y., 163, 170

Comments on Other Arguments of Plaintiff in Error

Plaintiff in error in its brief on the motion to dismiss or affirm urged before this court certain matters which are not raised by any assignment of error and which have necessarily been determined by the Court of Appeals of the State. None presents any Federal question, but each will be briefly considered.

(1) It is misleading to say that the Court of Appeals held "that the question of reasonablesness was not a judicial question." A reading of the Court of Appeals' opinion will make it clear that it held that it was the function of the court to review the determination of the Commission, so far as was "necessary to keep them (the Commission) within the law and to protect the constitutional rights of the corporations over which they are given control" (R., p. 288), but in making a determination there is a permissible range of discretion (*Louisville & Nashville R. R.* v. *Ga.*, 231 *U. S.*, 290, 313), and it was with reference to the decision within this range of discretion that the Court of Appeals held that the Appellate Division was in error in substituting its judgment of what was reasonable for that of the Commission.

The only constitutional right that the plaintiff in error possesses is to have determined by the courts the very question which the Court of Appeals said it was its duty to determine (Louisville & Nashville case, *supra,* at p. 314; Wadleigh Southern Ry. Co. *v.* Ga., 235 U. S., 651, 660).

(2) The contention that the burden was on the Commission to show the necessity of the extension may be

admitted, for it cannot be seriously questioned that the record contained ample evidence to show the public need for the service; but, however, when the public necessity was shown and the franchise obligation of the company admitted, it was the duty of the company to show that the performance of the duty would prevent it from earning a fair return upon all the property employed in the public service, if it desired to raise the question of confiscation. Nothing in the Oregon R. R. & Navigation case (224 U. S., 510, 533) justifies the conclusion that the burden was on the Commission to show affirmatively that if the order directing the extension was made, the company would receive a return of six per cent. on its entire investment. In that case the court simply held the burden to be on the Commission to show public necessity. The court carefully pointed out that if evidence is peculiarly within the knowledge of the company, it is the company's duty to produce its records in opposing the granting of the order. Certainly evidence as to the fair value of its property and the return thereon was peculiarly within the company's knowledge should have been produced if the claim of confiscation was seriously presented. Here no proof was offered to show that the company was not doing a profitable business, and to apply to the Commission in a proceeding to order extensions of gas mains the same rules that are applicable to proceedings to reduce gas rates would deny the public all practical relief, since to appraise the entire property of a gas company each time an improvement is ordered is manifestly impossible. The orders in the Chesapeake & Ohio case, 242 U. S., 603, and in the Portland Ry. case, 229 U. S., 397,

were upheld, although it appears that there was no such evidence adduced by the commission.

(3) The contention that the company was under no duty to supply Douglaston because the Transportation Corporations Law in force at the date of its incorporation only imposed the absolute duty to serve within 100 feet of its mains and that therefore the provision of the Public Service Commissions Law, Section 66, Subdivision 2, was inapplicable to it, is solely a question of construction of State statutes and raises no Federal question. It is disposed of by the decision of the Court of Appeals that it was the company's duty to make the extension if practicable. Furthermore, it is entirely clear that under the provision of the Transportation Corporations Law the Legislature has determined arbitrarily that all extensions within 100 feet must be made, whatever the necessity and cost and whatever the return, but under Section 66 of the Public Service Commissions Law, the facts of the particular case must be examined and it must be determined that the particular extension beyond 100 feet is one which under all the circumstances is reasonable. The latter statute is supplementary to and independent of the former, and was the result of a general demand that franchise holding public utilities be not permitted to be the sole arbiters of their duties to the public from which they had accepted valuable franchise rights.

(4) Plaintiff in error argues at length, although without any assignment of error in support thereof, that all the evidence was totally ignored by the Commission, which based its decision upon the irrelevant and unfounded assumption of a non-existent fact. The basis of the claim

is that the Commissioners, in considering whether it was reasonable to order the extension, took into consideration arguments which were advanced by the Consolidated Gas Company in another proceeding, and which led the Commission to permit the Consolidated Company to acquire the stock of the plaintiff in error; namely, that if such stock were acquired, the Consolidated Company would be in a position to finance extensions better than could the plaintiff in error.

The contention of the plaintiff in error entirely overlooks the fact that the opinion of Commissioner Maltbie (R. page 21), which gave careful consideration to all the evidence presented, was adopted by the vote of four of the five Commissioners (R. fol. 31) and the other Commissioners thereby adopted the reasoning whereby he reached the conclusion that the evidence justified the Commission in ordering the extension to be built. The record disclosed no substantial dispute as to the need of the service, but one of the points which was urged on the argument (although without any evidence to support it) was the possible difficulty of financing the extension. In replying to this argument it was quite natural for the Commissioners to meet the argument by considering the representations which had been made to it by the Consolidated Gas Company, the present sole stockholder of the plaintiff in error, and the making of which was practically conceded upon such argument (R. ~~fol.~~ page 252), to induce the Commission to permit the purchase by that company of the entire stock of the plaintiff in error. As there was no evidence offered by the company that there would be any difficulty in financing, the statement was evidently made simply to indicate the Commissioners' views that in fact there would

be no such difficulty. As the order was warranted by the evidence, which was considered in the opinion of Commissioner Maltbie and concurred in by the other Commissioners, the additional reason assigned by the concurring Commissioners is neither controlling or material. Certainly the mere reference to matters which had been discussed on the argument without evidence in support of such argument appearing in the record is insufficient to overcome the presumption that the Commissioners based their decision upon all the evidence in the case and discharged their duties in accordance with their oaths and with the law (*Ross* v. *Reid*, 1, Wheaton 482, 486; *Gonzales* v. *Ross*, 120 U. S. 605, 616).

(5) The Principal Authority Relied on by the Plaintiff in Error.

The authority almost solely relied upon by the plaintiff in error is *Oregon R. R. and N. Co.* v. *Fairchild* (224 U. S. 510), but an examination of the opinion of Mr. Justice Lamar in that case discloses little of aid to the present assignment of error. The order scrutinized in the Fairchild case was a sweeping direction for the construction of track connections between various railroads, at numerous points where the railroads were not physically connected and had not contemplated ever being connected. The order was based palpably on a theory that adjacent railroads should be connected by tracks whenever they ran near each other at shipping points, and this Court found and observed (p. 532) that "here there was no evidence whatever warranting a finding that there was any public necessity for the track connections." There had not even been any requests, any public demand, for the connections;

it did not appear that any one needed them or would be better served if they were built.

The Court expressly approves the case of *Wisconsin, &c., Railroad* v. *Jacobson,* 179 U. S. 287 (cited by the New York Court of Appeals), in which an order directing the construction of sidetracks was upheld because there was proof of public demand and the Court points out that in the case before it such proof was totally lacking. Nor are any of the other authorities hereinbefore referred to in any way limited by that decision. The Court did not even lay down any intimation that there was a question for federal review where the facility ordered was necessary for the furnishing of a service to a portion of the public within the company's franchise area which otherwise would have no service at all, and where the evidence taken at a fair hearing before the State tribunal clearly showed the need for such facility and service with no accruing disadvantage to the company except that at the beginning the earnings from the service first afforded from the additional facility would be no more than 2½ to 4 per cent. upon the cost of the addition itself.

IN CONCLUSION

It is respectfully submitted that the real grievance of the plaintiff in error is against the decision of the Court of Appeals because that Court has adopted for the first time fully the salutary Federal rule as to the permissible scope of judicial review of Commission orders. It is really to avoid the effects of this interpretation as a general judicial rule rather than its application to the particular facts in this case that the complainant in error seeks the

modification of or amelioration from the opinion of the New York Court of Appeals.

This case is vital to the efficiency of expert regulation in the public interest as the desirable alternative for the casual directions of the legislature. If an order of a State commission directing an extension by a public utility within its franchise area which would in no perceptible way affect the total earnings of the company or its return from all of its property used in the public service may be held void in this Court upon a consideration of testimony clearly preponderating in favor of the order and the enforcement of such an order delayed for years by the simple expedient of assertion of the existence of a federal question, then the usefulness and efficacy of regulation through reasoned adjudication is greatly impaired. Perhaps nowhere has the proper relation between Commissions and the Courts been more trenchantly expressed than by Mr. Justice Hughes, at the time of his speaking a member of this Court, in his memorable address before the New York State Bar Association, in January, 1916, where he said:

> "The only reason for the creation of the new administration instrumentalities, which appear to present government in a new phase, is the complexity of the facts with which government undertakes to deal and the necessity, if they are wisely dealt with, for the continuous and expert attention of a body exclusively concerned with the particular subject. To put upon the courts the burden of considering the details of administrative problems would be to overwhelm them; but for the courts to revise and rescind administrative action without a competent and close study of all the pertinent facts

would be not only to destroy the effectiveness of the administrative agencies, but also seriously to impair the confidence reposed in judicial tribunals. It cannot be too strongly insisted that if we are to have these important administrative instrumentalities properly perform their duty, they should stand on their own footing, and that the public should realize that their safeguard is not in injecting the courts into the work of administration, to the confusion of both, but in maintaining an enlightened policy and in insisting upon proper standards of official conduct. The courts cannot be substituted for administrative agencies; nor, as I believe, is it to the ultimate advantage of the community to divide between them the responsibility for purely administrative action."

Respectfully submitted,

WILLIAM L. RANSOM,
GODFREY GOLDMARK,
GEORGE H. STOVER,
Counsel for Defendants in Error.

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Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in Error

against

EDWARD E. MCCALL *et al.*, Commissioners, constituting the Public Service Commission of the State of New York for the First District,
Defendants in Error

October Term, 1917
No. 407

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR ON THE QUESTION OF THIS COURT'S JURISDICTION TO ENTERTAIN THE WRIT OF ERROR

Upon the argument of this case on November 6, 1917, the Court raised the question whether the Writ of Error had been applied for within three months after entry of the judgment complained of, in accordance with the provisions of the Act of September 6, 1916. Leave was granted the defendants in error to file a supplemental brief on this question, and this brief is submitted in pursuance of that permission.

The act approved September 6, 1916, provides as follows:

> "Sec. 6. That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months.
>
> "Sec. 7. That this Act shall take effect thirty days after its approval, but it shall not apply to nor affect any writ of error, appeal, or writ of certiorari theretofore duly applied for. The right of review under existing laws in respect of judgments and decrees entered before this Act takes effect shall remain unaffected for the period of six months thereafter, but at the end of that time such right shall cease.
>
> "Approved, September 6, 1916."

A determination of the question raised requires a statement of the several proceedings taken in the State courts and the dates thereof.

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October 11, 1916.	Remittitur (which includes the record) filed with Clerk of State Supreme Court	p. 285
October 11, 1916.	Order for Judgment on Remittitur entered by State Supreme Court.	p. 284
October 17, 1916.	Judgmen on Remittitur entered in State Supreme Court	p. 285-6
October 26, 1916.	Notice of motion that Court of Appeals request return of remittitur and for order permitting reargument ..	p. 297-298
December 28, 1916.	Motion for Reargument denied	p. 297
January 30, 1917.	Petition for writ of error presented	p. 286-288
January 30, 1917.	Writ of error allowed...	p. 288

I

IRRESPECTIVE OF THE EFFECT OF THE MOTION THAT THE COURT OF APPEALS REQUEST A RETURN OF THE REMITTITUR AND PERMIT REARGUMENT, IT IS CLEAR THAT THE WRIT OF ERROR WAS NOT APPLIED FOR WITHIN THE STATUTORY TIME

1. The Act provides that the writ must be applied for within three months after entry of the judgment complained of. The judgment here complained of and which the writ brought up for review was the judgment of the Supreme Court entered on October 17, 1916, upon the remittitur from the Court of Appeals. The writ of error was applied for on January 30, 1917 three months and thirteen days thereafter and therefore not within the statutory time.

2. The saving clause in the first sentence of section 7 of the Act has no application, for the Act took effect on October 6, 1916, and the writ was not applied for before that date.

The judgment sought to be reviewed was entered October 17, 1916, *after* the Act took effect and therefore the second sentence of section 7 is inapplicable which provides that "the right of review under existing laws in respect of judgments and decrees entered *before* this Act takes effect shall remain unaffected for the period of six months thereafter." The fact that the decision of the Court of Appeals was rendered on October 3, 1916, and its remittitur issued on the next day is immaterial.

The writ of error must and in this case does (R. p. 290) run to the Court where the record remains and in which Court the final judgment was rendered by whose process such judgment is to be executed. That Court was the State Supreme Court.

Wedding *v.* Meyler, 192 U. S., 573, 581.
Polleys *v.* Black River Co., 113 U. S., 81, 82.

II

THE MOTION ASKING THE COURT OF APPEALS TO "REQUEST" A RETURN OF ITS REMITTITUR AND FOR AN "ORDER PERMITTING A REARGUMENT" DID NOT PREVENT THE JUDGMENT OF OCTOBER 17, 1916, FROM TAKING EFFECT AND THEREFORE DID NOT EXTEND THE TIME WITHIN WHICH THE WRIT OF ERROR MIGHT BE ALLOWED

The grounds of the motion in the Court of Appeals are found at the top of page 298 of the record. The motion papers and the order denying the motion were never remitted to the State Supreme Court, although they are found in the transcript of the record from that court.

Upon the argument it was stated that this Court has many times held that the time within which a writ of error may be obtained does not begin to run until a motion for reargument is disposed of. An examination of the cases in this Court shows, however, that this rule has been

applied only in those cases where the Court in which the motion for rehearing, or for a new trial was made, had *control of the judgment*. In such cases the reason for the rule was that when the Court entertained the motion the judgment was impliedly *suspended* and was prevented from taking effect for the purposes of appeal until the motion was decided.

But, as will be hereafter particularly pointed out, the New York Court of Appeals did not have control of the judgment sought to be reviewed, and lost its jurisdiction when the judgment on the remittitur was entered in the State Supreme Court on October 17, 1916. The mere filing of the motion subsequently denied could not impliedly suspend the judgment here sought to be reviewed. Therefore the principle of the cases relied upon has no application to the present case.

FEDERAL CASES

The earliest case in this Court is Brockett *vs.* Brockett, 2 How., 238. There a final decree was entered on the Chancery side of the Circuit Court, and during the same term a petition to reopen the decree was filed and referred to a Master. Upon his report the Court refused to open its former decree and an appeal was then taken from this refusal and from the original final decree. Upon motion to dismiss on the ground that an appeal was not taken within thirty days this Court said:

> "But the short and conclusive answer to this objection is that the final decree of the 10th of May *was suspended* by the subsequent action of the Court; and it did not take effect until the 9th of June, and that the appeal was duly taken and the

appeal bond given within ten days from the last period."

In *Memphis* vs. *Brown*, 94 U. S., 715, a motion was made in the *trial Court* to set aside a judgment. This Court said at page 717:

> "Under the ruling in Brockett *vs.* Brockett, 2 How., 241, the motion made during the term to set aside the judgment of March 2 *suspended the operation of that judgment*, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the Court had the right to do during the term, and for the very purpose of giving it effect for a *supersedeas* (Sage *et al., vs.* Central Railroad Company of Iowa *et al.*, 93 U. S., 412). As the writ was issued on the day of the order, and its allowance embraced in the entry recording the order itself, there cannot be any doubt of the intention of the Court to give the judgment at that time such an effect."

In *Texas & Pacific Ry. Co.* v. *Murphy*, 111 U. S., 488, a writ of error was directed to the Supreme Court of Texas which is the highest Appellate Court. After the affirmance by that Court of the judgment of the Texas District Court a motion for rehearing was made and thereafter denied. It was held in this Court on authority of the foregoing cases that the judgment of the Supreme Court was suspended. This Court said:

> "In Brocket *v.* Brocket, 2 How., 238, it was decided that a petition for rehearing, presented in due season and entertained by the court, *prevented*

> *the original judgment from taking effect as a final judgment,* for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show in express terms when the motion for a rehearing was made, but it was entertained by the court and decided on its merits. The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the court *control of the judgment which had been entered, and jurisdiction to enforce any order that might be made.* This presumption has not been overcome."

In that case, however, it appears from an examination of the Transcript of Record that the Judgment of the Supreme Court was not remitted to the court below and that the Supreme Court was itself the highest court of the State in which a decision could be had. [See petition for writ of error in that case, Record, p. 42.]

The record remained in the Appellate Court and was certified to this Court by the clerk of the Appellate Court [Record in that case, p. 46]. It is evident therefore that it was the Appellate Court that at all times had control of the judgment and the record and could enforce any order made.

Aspen Mining and Smelting Co. v. *Billings,* 150 *U. S.,* 31, was an appeal from *a trial court,* the U. S. Circuit Court of Colorado. An application for a rehearing of a decree dismissing complainant's bill was not disposed of for some months after the entry of the decree. This Court said, p. 36:

> "The rule is that if a motion or a petition for rehearing is made or presented in season and enter-

tained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Brockett *v.* Brockett, 2 How., 238, 249; Texas & Pacific Railway *v.* Murphy, 111 U. S., 488; Memphis *v.* Brown, 94 U. S., 715."

In *Kingman* v. *Western Manufacturing Co.*, 170 *U. S.*, 675, a motion for new trial was filed in the U. S. District Court three days after the return of a verdict. This motion was not decided for some months. This Court said:

"The question before us is merely whether a judgment is final, so that jurisdiction of the Appellate Court may be invoked while it is *still under the control of the trial court* through the pendency of a motion for a new trial. We do not think it is and are of opinion that the limitation did not commence to run in this case until the motion for new trial is overruled."

See too *Clark* v. *Eureka County Bank*, 131 *Federal*, 145, 146.

In *in re McCall*, 145 *Federal*, 898, Lurton, *J.*, said:

"The order of confirmation was made October 3, 1905. The application for an appeal was made October 21, 1905. Judge McCall denied the appeal because not within the time limit, and that is the only question for decision. The transcript shows that on October 5, 1905, the relators filed a written petition praying for a rehearing in the matter of the confirmation of the composition. The effect of such a motion, when filed seasonably, is *to suspend the finality of the order or judgment sought to be reheard until disposed* of, and the time limit for an

appeal or writ of error does not begin to run until it is disposed of. Brockett *et al. v.* Brockett, 2 How. 238; Aspen Mining Co. *v.* Billings, 150 U. S. 31-36, 14 Sup. Ct. 4, 37 L. Ed. 986; Northern Pacific R. R. *v.* Holmes, 155 U. S. 137, 138, 15 Sup. Ct. 28, 39 L. Ed. 99; Klingman *v.* Western Manf'g. Co., 170 U. S. 675 18 Sup. Ct. 786, 42 L. Ed. 1192."

Bierce v. *Waterhouse,* 219 U. S. 320, came to this Court by writ of error from the Supreme Court of Hawaii. One question in the case was when the judgment in Bierce *v.* Hutchins in the Hawaii courts became final. It appears (Opinion, p. 336) that while the opinion of the Hawaii Court in Bierce *v.* Hutchins was rendered on January 28, 1905, no judgment was entered until May 6, 1905, after the decision of a motion for a rehearing. Under these circumstances this Court held that the judgment of the Supreme Court of Hawaii did not become effective until the later date. An examination of the transcript of the record shows that there was in fact no judgment rendered on January 28, 1905, and that the *only* judgment was rendered after the reargument had been had. (See Record in that case, p. 54.) Of course, under these circumstances the judgment entered on May 6, 1905, was the final and the only judgment.

U. S. v. *Ellicott,* 223 U. S., 524, 539 came to this Court from the Court of Claims, and the foregoing cases were followed, because the application for a new trial was "-entertained by the Court" of first instance, which, of course, had control of the entire proceeding. Its own act impliedly suspended its own judgment.

Loveland in his Appellate Jurisdiction of the Federal Courts says, section 41:

> "The reason for this rule is that while a motion is pending the lower court has not lost its jurisdiction over the case, and having power to grant a new trial or rehearing the judgment or decree is not final for the purpose of suing out a writ of error or taking an appeal."

In all of the foregoing cases the time to appeal or obtain a writ of error was held not to have expired because the judgment was "*suspended*" by the motion in the very court which had *"control of the judgment,"* and which after the motion was *"entertained"* could itself vacate such judgment.

THE PRACTICE IN NEW YORK STATE

It will now be shown that the motion made in the New York Court of Appeals did not suspend the judgment of October 17, 1916, in the State Supreme Court and that the Appellate Court never had control of that judgment.

Section 194 of the New York Code of Civil Procedure provides:

> "The judgment or order of the Court of Appeals must be remitted to the Court below, to be enforced according to law."

In Peo. *ex rel.* Smith *v.* Nelliston, 79 N. Y., 638, the Court of Appeals said:

> "There is some uncertainty in the practice as to the precise time when this court loses jurisdiction of a cause brought here upon appeal (Burkle *v.* Luce, 1 Com., 239; Martin *v.* Wilson, *id.*, 240; Palmer *v.* Lawrence, 1 Seld., 455; Seacord *v.* Morgan, 17 How. Pr., 394; Wilmerdings *v.* Fowler, 15 Abb. Pr. (N. S.), 86; Cushman *v.* Hadfield, *id.*,

109). For the purpose of settling this uncertainty, we now hold that jurisdiction in this court is not lost until the remittitur has been filed in the court below, and that court has taken some action thereon."

In Franklin Bank Note Co. *v.* Mackey, 158 N. Y., 683, 684, Judge Bartlett said:

> "This is a motion that the court *request* the return of the remittitur by the court below for the purposes of the application. There is a very general misapprehension as to the practice of the court on motions for reargument or to amend the remittitur. It is often erroneously assumed that after the filing of the remittitur in the court below, and order entered thereon, this court is deprived of all jurisdiction in the cause. In Sweet v. Mowry (138 N. Y. 650), a motion for reargument was granted, and a return of the remittitur *requested*. These acts of the court were held to be in resumption of jurisdiction. In Lawrence *v.* Church (128 N. Y. 324), a motion to amend the remittitur was granted, and the order entered *requested* the return of the remittitur by the court below, and when so returned it was ordered to be amended. In Moffett *v.* Elmendorf (153 N. Y. 674) a motion to amend remittitur was granted, and order entered that the remittitur be recalled for that purpose. A like motion was granted in Buchanan *v.* Little (155 N. Y. 635). This later practice of the court is not necessarily inconsistent with the earlier cases, which hold that this court has no jurisdiction to grant a reargument or an amendment of the remittitur after the remittitur is filed and acted upon in the court below. (Wilmerdings *v.* Fowler, 15 Abb. Prac. [N. S.] 86; Jones *v.* Anderson, 71 N. Y.

599; Cushman *v.* Hadfield, 15 Abb. Prac. [N. S.] 109; People *ex rel.* Smith *v.* Village of Nelliston 79 N. Y. 638.) It is competent for this court to determine whether it will *resume jurisdiction* for any purpose, and, having decided to do so, it then *requests* the court below to return the remittitur so that reargument can be had or the remittitur amended, as the case may be. It is technically true that this court must be repossessed of the remittitur before an order made in the case is effectual, but there is no objection to the return of the remittitur following the determination of this court to *resume jurisdiction.* The Supreme Court is always reluctant to vacate its order and return the remittitur in the absence of an expression by this court that it *desires* such a course to be pursued. (Hillyer *v.* Vandewater, 11 N. Y. Suppl. 167.) I am of opinion that there was jurisdiction to grant the order to show cause herein."

In the present case the court never did "*request*" a return of the record and never did "*resume jurisdiction.*"

It is important to note that the motion in the Court of Appeals in the present case was that that Court "request" the return of the remittitur and that in the Franklin Bank Note case and the cases therein cited the Court of Appeals simply *requests* the return of the remittitur.

There is in fact no power vested in the Court of Appeals to *compel* a return of the remittitur, and its return lies entirely in the *discretion* of the Supreme Court.

This the Court of Appeals itself held in Wilmerdings *v.* Fowler, 15 Abbott's Practice (New Series) 86, 90, which case was said in the Franklin Bank Note case, *ante,* not to be inconsistent with the later cases.

In the Wilmerdings case the Court said:

> "In view of all the facts, we might feel inclined to hear the case reargued but for the objection that it is beyond the jurisdiction of this court, by the filing of the remittitur, and entry of the usual order thereon in the court below. When that has been done regularly, we have no further jurisdiction over the case, not even to grant a motion for reargument. Before the remittitur has been actually filed we can control it, but after that and the entry of the order the case is beyond our reach.
>
> "I see no way to avoid this objection, unless the court below should see fit to vacate the filing and order, in which case perhaps we might regard it as though the act had never been done, *but the propriety of such a course is entirely discretionary with that court.*
>
> "The motion must be denied, but without prejudice and without costs."

The report of that case then shows the following at p. 90:

> "The defendant then applied in the court below at special term and chambers, upon an affidavit and a copy of this opinion; *and after hearing counsel for both parties,* the court ordered that the filing of the remittitur and the order of the supreme court making the same the order of that court, be vacated and set aside, and that the clerk be directed to return the remittitur to the court of appeals for its further action.
>
> "This having been done, a second motion for a reargument was made in this court."

Therefore before the Court of Appeals has jurisdiction to actually hear reargument, it must first "request" the Supreme Court to return the remittitur. A motion must

then be made in the latter court asking for an order vacating the judgment entered on the remittitur and directing the return of the remittitur. The granting of such a motion is "entirely discretionary" with the Supreme Court. When the remittitur is filed and the judgment is entered the latter is in full force and operative, and such a motion may well be opposed in some cases on the ground that the vacating of the judgment may be inequitable because of proceedings taken thereunder. When, and only when, the various steps outlined above have been taken and the remittitur is returned is the Court of Appeals reinvested with jurisdiction. Then, and then only, has it *control* of the judgment and can it *entertain the motion* and actually order reargument.

In view of these authorities, it cannot be said that the judgment of the State Supreme Court of October 17, 1916, entered on the remittitur of the Court of Appeals, was "suspended" by the action of a court which had "control of the judgment." The motion in the Court of Appeals —that that Court "request" the return of the remittitur (R., p. 298)—recognizes that the Court had no power in the matter and that it had lost jurisdiction. *The fundamental weakness of the argument of plaintiff in error is that the motion was made in a court which did not have control of the record or of the judgment. And on no theory therefore can such motion be deemed impliedly or expressly to suspend the judgment in another court and so extend the time to obtain a writ of error.*

In fact, the notice of motion and order of the Court of Appeals (R., p. 297) have no place in the record certified to this Court by the Clerk of the State Supreme Court, in

obedience to the writ of error. That writ runs to the Court having the record; but the record on the motion remains in the Court of Appeals, and *it does not appear that it was ever remitted to the Supreme Court.* The remittitur is dated October 4, 1916 (R., p. b), and the reargument was not denied until December 28, 1916 (R., p. 297). The motion and order are no part of the record of the Supreme Court and their inclusion in the return does not make them such.

A holding that the judgment of the State Supreme Court entered on the remittitur is suspended by a motion in the Court of Appeals that the return of the remittitur be requested will lead to much confusion.

There is no duty on the part of the Clerk of the Supreme Court to return to this court proceedings in the Court of Appeals which are not remitted to him and no duty on the part of the Court of Appeals to remit such proceedings. Will this court in every instance where it is claimed that such a motion was made and the record is silent have to determine by extraneous evidence whether in fact such motion was made in order to determine whether the judgment has been suspended, or will it issue a second writ to the Court of Appeals to return the motion?

It is submitted that the true rule is that if no action to suspend the judgment has been taken by the court that controls the judgment that a motion in the Appellate Court "requesting" the lower court in its discretion to return the remittitur, which motion is denied, should not be deemed to suspend the judgment of another Court and extend the time to obtain the writ, and that in the language of the Statute the writ of error must be applied for within three months after entry of the judgment com-

plained of. If this is the law, then the writ of error in this case must be dismissed for lack of jurisdiction.

THE PRACTICE THAT SHOULD HAVE BEEN PURSUED

It may be added that the proper practice to pursue where a reargument is sought and where it is feared that there will not be sufficient time after the determination of the motion to obtain a writ of error is to obtain *ex parte* an order staying the filing of the remittitur. Cushman *v.* Hatfield, 15 Abbott's Practice, New Series, 109 (Court of Appeals). If the remittitur has been issued or filed, but no judgment entered, then an order from the Court of Appeals staying the entry of judgment can, nevertheless, be obtained, because jurisdiction is not lost until the lower court takes some action (Peo. *ex rel.* Smith *v.* Nellison, 79 N. Y., 638 *ante*).

In either case the Court of Appeals would retain jurisdiction of the case until the motion for reargument was determined, and the time to obtain the writ of error would not start to run until the judgment on remittitur was thereafter entered.

Under this practice there would be no conflict of jurisdiction between the State courts and no necessity for two writs of error—one to bring up the record remitted to the State Supreme Court and the other to bring up the motion in the Court of Appeals, which may never have been remitted.

It is a common practice in this Court to ask that the sending down of the mandate be delayed, under Rule 39 and it is submitted that the same practice should be followed in the State Court of Appeals, if a writ of error is

to be sought upon the denial of a motion for reargument, and such a stay deemed necessary. In the present case no stay was in fact necessary. The motion in the Court of Appeals was denied December 28, 1916 and the three months limitation did not expire until January 17, 1917. Had the plaintiff in error been diligent the writ could easily have been obtained in the twenty days intervening. Its failure to stay the remittitur and its failure to prosecute its rights diligently upon the denial of the motion cannot extend the jurisdiction of this Court.

Respectfully submitted,

WILLIAM L. RANSOM,
GODFREY GOLDMARK,
GEORGE H. STOVER,
Counsel for Defendants in Error.

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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 407.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in Error,

vs.

EDWARD E. McCALL ET AL., Commissioners, constituting the Public Service Commission of the State of New York, for the First District,
Defendants in Error.

Memorandum for Plaintiff in Error, upon question of jurisdiction.

JOHN A. GARVER,
Counsel for Plaintiff in Error,
55 WALL STREET,
New York.

C. G. BURGOYNE PRINTING BUSINESS, 72-78 Spring St., New York.

Supreme Court of the United States,

OCTOBER TERM, 1916,

No. 407.

PEOPLE OF THE STATE OF NEW YORK, EX REL. NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in error,

AGAINST

EDWARD E. MCCALL, ET AL., Commissioners, constituting the Public Service Commission of the State of New York, for the First District,
Defendants in error.

Memorandum for plaintiff in error, in support of jurisdiction.

Statement.

The case is before this Court on a writ of error to the Supreme Court of the State of New York, which was allowed by the Chief Judge of the Court of Appeals of that State. The question has been raised whether the writ was sued out in time to give this Court jurisdiction under the Act of September 6, 1916, which took effect on October 6, 1916 (39 Stat. L., 726).

The defendants in error appealed to the New York Court of Appeals from an order of the Appellate Division of the

Supreme Court, which sustained a writ of *certiorari* obtained by the plaintiff in error and annulled an order of the Public Service Commission (Record, p. 274). The Court of Appeals, by a judgment dated October 4, 1916, reversed the order of the Appellate Division; and its judgment, bearing that date, was duly transmitted with the remittitur to the court below (the Supreme Court of the State, in the County of New York), to be enforced according to law (Record, pp. *a*, *b*). On October 11, 1916, an order was made, without notice to the plaintiff in error, by a Justice of the Supreme Court, making the judgment of the Court of Appeals the judgment of that Court; and on October 17, 1916, judgment was formally entered in the Supreme Court by its Clerk in favor of the Public Service Commission (Record, p. 285).

On October 26, 1916, the plaintiff in error applied to the Court of Appeals for a reargument, praying that the Court request the return of its remittitur for that purpose, and that, in case a reargument should be denied, it amend its remittitur in certain respects (Record, p. 297). The motion was denied, by an order entered on December 28, 1916, in which it was recited that papers had been duly submitted on the motion and due deliberation thereupon had (Record, p. 297).

The writ of error to this Court was applied for and allowed on January 30, 1917 (Record, p. 288).

Section 6 of the Act of September 6, 1916, provides:

> "That no writ of error, appeal or writ of *certiorari* intended to bring up any cause for review by the Supreme Court shall be allowed or entertained, unless duly applied for within three months after entry of the judgment or decree complained of; * * * "

Section 7 provides:

> "This act shall take effect thirty days after its approval, but it shall not apply to nor affect any writ of error, appeal, or writ of *certiorari* theretofore duly ap-

plied for. The right of review under existing laws in respect of judgments and decrees entered before this Act took effect shall remain unaffected for the period of six months thereafter, but at the end of that time, such right shall cease."

As above stated, this Act took effect on October 6, 1916.

POINTS.

FIRST.

Only the judgment of the Court of Appeals is reviewable by this Court.

I. This Court can review only a final judgment of the highest court of a State in which a decision in the suit could be had.

Judicial Code, Sec. 237.

The highest state court in the case at bar was the Court of Appeals, which did, in fact, render a decision and judgment. That judgment was forthwith transmitted to the Supreme Court of the State of New York, in compliance with the statutory requirement:

> "The judgment or order of the Court of Appeals must be remitted to the court below, to be enforced according to law."
>
> Code of Civil Procedure, Sec. 194.

The writ of error from this Court was, therefore, properly addressed to the Supreme Court of the State, which has the custody of the record, including the final judgment of the Court of Appeals.

Gelston v. Hoyt, 3 Wheat., 246;
Atherton v. Fowler, 91 U. S., 143;
St. John v. New York, 201 U. S., 633, 634;
McIntyre v. Kavanaugh, 242 U. S., 138, 139.

In Gelston v. Hoyt, STORY, J., in delivering the opinion of the Court, said (p. 304):

> "The judgment to be examined must be that of the highest court of the State having cognizance of the case; but the record of that judgment may be brought from any court in which it may be legally deposited and in which it may be found by the writ."

II. The entry of the judgment in the Supreme Court, on the remittitur, was a mere administrative act, for the purpose of enforcing the judgment of the Court of Appeals. It was entered by the Clerk, upon an order made by a Justice of the Supreme Court, without notice to the plaintiff in error, and was only a step in the procedure for enforcing the judgment and collecting the costs imposed (Record, pp. 284-6). Both the order and judgment of the Supreme Court were based solely on the judgment of the Court of Appeals, and no discretion was vested in the Supreme Court.

If the judgment of the Court of Appeals should be modified, appropriate action would have to be taken by the Supreme Court of the State to carry the modification into effect.

SECOND.

The writ was obtained within the six months allowed by the saving clause of the Act.

Section 7 of the Act of September 6, 1916, provides that in respect to judgments entered *before* the Act took effect, the right of review under existing laws should remain unaffected for a period of six months after the Act took effect (October 6, 1916), thus giving the right to obtain a writ to review a judgment previously entered until April 6, 1917. The judgment of the Court of Appeals was entered on October 4, 1916,

two days *before* the Act took effect (Record, pp. *a*, *b*); and as the writ was obtained on January 30, 1917 (Record, p. 288), it was obtained in due time.

THIRD.

The writ was obtained within the three months permitted by Section 6 of the Act.

I. Where a motion for a new trial or reargument is duly made, the time within which to apply for a writ of error does not begin to run until the entry of an order denying the motion

Brockett v. Brockett, 2 How., 238;
Memphis v. Brown, 94 U. S., 715;
Texas & Pac. Ry. Co. v. Murphy, 111 U. S., 488;
Aspen Mining & Smelting Co. v. Billings, 150 U. S., 31, 36;
Kingman v. Western Mfg. Co., 170 U. S., 675;
Wm. W. Pierce Ltd. v. Waterhouse, 219 U. S., 320, 336–7.

In Texas & Pacific Ry. Co. v. Murphy (*supra*), the Court said (p. 489):

> "It was expressly held in Brockett v. Brockett, which has been followed in many cases since, that if a petition for a rehearing is presented in season and entertained by the Court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of."

II. The motion for a reargument in the case at bar was made on October 26, 1916, and was denied on December 28, 1916 (Record, p. 297). The order denying the motion recites that papers had been duly submitted on the motion and "due deliberation thereupon had."

In Kingman v. Western Manufacturing Co. (*supra*), this Court said (p. 678):

> "As it (the motion for a new trial) was entertained by the Court, argued by counsel without objection and passed upon, it must be presumed that it was regularly and properly made."

Even if the saving clause (Section 7) of the Act of September 6, 1916, did not apply, the plaintiff in error in the present case had until March 28, 1917, in which to obtain the writ of error; and the granting of the writ on January 30, 1917, was in due season.

The reason for the rule laid down in the cases cited above, is that the judgment sought to be reviewed is *suspended* pending the determination of a motion for a reargument; and, of course, the fact that the judgment of the Court of Appeals in this case was filed in another court, could not prevent the motion for a reargument from having its customary effect.

III. Even if it were admitted, for the sake of the argument, that the final judgment to be reviewed was that of the Supreme Court, entered on the remittitur of the Court of Appeals on October 17, 1916 (Record, pp. 285-6), the result would be the same. If that was the final judgment, then a motion for a reargument would necessarily suspend that judgment equally with the judgment of the Court of Appeals.

IV. On the oral argument, counsel for the defendants in error suggested that the Court of Appeals did not have power to reconsider its own decisions.

> 1. It would be strange indeed if the highest Court of the State of New York did not have the power to reconsider its decisions. The presumption is against such a suggestion; and the fact that the Court in the case at bar did entertain the motion for a reargument,

considered it on its merits and denied it, is in itself a complete answer to any such contention.

Texas & Pac. Ry. Co. v. Murphy, 111 U. S., 488, 489.

2. One of the formal rules of practice prescribed by the Court of Appeals (Rule XX.) provides for motions for reargument in the following language:

> "*Motions for Reargument.*—Motions for reargument must be submitted on printed briefs, without oral argument, on notice to the adverse part, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case, and to the authorities relied upon."

3. In every volume of the official reports of the decisions of the Court of Appeals, numerous examples will be found of the denial of motions for reargument. In the last volume (Vol. 220), denials of such motions appear on pages 571, 573, 612, 654 and 776.

4. The record in the present case shows that the remittitur was transmitted by the Court of Appeals immediately on the filing of the decision (Record, pp. *a*, *b* and 279), not being retained for any definite time, as in this Court. All motions for reargument in the Court of Appeals are, therefore, made after the remittitur has been transmitted to the lower Court.

An example of the granting of a motion for reargument is found in Second National Bank v. City of New York (214 N. Y., 658). The certified copy of the order in that case (submitted herewith and a copy of which is appended to this memorandum) shows that the Court, in granting the motion, provided for the return of the remittitur.

In Moffett v. Elmendorf (153 N. Y., 674), the Court granted a motion to amend the remittitur and directed that the remittitur be recalled and amended accordingly.

5. The jurisdiction of the Court of Appeals to entertain motions for reargument or to amend the remittitur was fully explained by Judge BARTLETT, in Franklin Bank Note Co. v. Mackey (158 N. Y., 683), where it was held that the Court did have the power to entertain a motion for a reargument *and grant a stay of proceedings*, after judgment had been entered on the remittitur in the Court below and before the remittitur had been recalled; and the practice of the Court of Appeals has ever since been in accordance with that decision.

FOURTH.

Comments on the brief of defendants in error.

I. Counsel for the defendants in error necessarily concede that if the judgment to be reviewed is that of the Court of Appeals, the writ of error was duly obtained within the six months allowed by Section 7 of the Act of September 6, 1916.

Their entire argument is based on the erroneous assumption that the judgment sought to be reviewed is that of the Supreme Court and not that of the Court of Appeals.

II. On the effect of the motion for a reargument, counsel rely on some early cases, laying particular stress on Wilmerdings v. Fowler (15 Abb. Pr., N. S., 86), as holding that the Court of Appeals loses all jurisdiction as soon as the remittitur is filed in the Court below. But in Franklin Bank Note Co. v. Mackey (158 N. Y., 683), after referring specifically to

those cases, it was distinctly held that on June 24, 1898, *more than a month after judgment had been entered on the remittitur in the court below*, a Judge of the Court of Appeals still had power to make an order to show cause, returnable on the first Monday of October, why a return of the remittitur should not be requested and a reargument ordered, *and to stay all proceedings meantime.* After referring to the earlier decisions, Judge BARTLETT said (p. 685):

> "It is competent for this Court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the Court below to return the remittitur so that the reargument can be had, or the remittitur amended, as the case may be. It is *technically* true that this Court must be repossessed of the remittitur before an order made in the case is effectual; but there is no objection to the return of the remittitur following the determination of this Court to resume jurisdiction. * * * *I am of the opinion that there was jurisdiction to grant the order to show cause herein.*"

In spite of the fact that the Court did not have possession of the remittitur and that judgment had been previously entered on the remittitur in the court below, the Court of Appeals in that case not only adopted the opinion of Judge BARTLETT by having it published in its official reports, but it heard and decided the motion, granting a reargument (157 N. Y., 674) and then recalling the remittitur for that purpose. Its decision on the reargument is reported in 158 N. Y., 140.

III. Every volume of the official reports of the decisions of the Court of Appeals since the decision in Franklin Bank Note Co. v. Mackey contains the record of numerous instances where motions for a reargument have been heard and decided without first recalling the remittitur; and the practice is now definitely settled, that such motions may be made and decided after the remittitur has been filed and judgment entered in the court below, and without first recalling the remittitur.

To the extent that this practice may be inconsistent with the view of the jurisdiction of the Court expressed in the earlier cases, those cases must be regarded as overruled.

IV. This long-settled practice of the Court is perhaps in disregard of the strict logic that counsel for the defendants in error would apply. It might "technically" be more logical for the Court of Appeals to act before the remittitur has been transmitted to the lower Court. But, inasmuch as the remittitur is transmitted forthwith upon the decision of the Court, there would be no opportunity for counsel in distant parts of the State, or, for that matter, even in Albany, to adopt "the practice that should have been pursued." Several days may elapse after the decision is made before counsel can obtain a copy of the opinion of the Court and decide whether it is advisable to apply for a reargument. To adopt the suggestion made by counsel for the defendants in error would be to make it practically impossible ever to apply for a reargument. The Court has, therefore, wisely decided to disregard the strict logic of the situation and to retain the right to reconsider its decisions without first going through the cumbersome formalities connected with a return of the remittitur. No instance has been pointed out or can be found where the remittitur was not promptly returned to the Court of Appeals upon an expression of a wish by the Court to that effect.

Washington, November 19, 1917.

JOHN A. GARVER,
Counsel for plaintiff in error.

(Appendix, next page.)

Appendix.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at the Capitol in the City of Albany, on the third day of March, A. D. 1915.

Present—HON. WILLARD BARTLETT, Chief Judge, Presiding.

SECOND NATIONAL BANK OF THE CITY OF NEW YORK, Appellant, vs. THE CITY OF NEW YORK, Respondent.	Order on motion for reargument.

A motion for a reargument of the above case having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is granted. And the Supreme Court of the State of New York is hereby requested to direct its clerk to return the remittitur heretofore issued herein to the Clerk of this Court for reargument accordingly.

A Copy.

JNO. H. REYNOLDS,
Deputy Clerk.

[SEAL.]

[16988]

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Office Supreme Court, U. S.
FILED
MAY 21 1917
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Supreme Court of the United States

OCTOBER TERM, 1916.

No. [redacted] 407

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
NEW YORK AND QUEENS GAS COMPANY
Plaintiff in Error

vs.

EDWARD E. McCALL, *et al.*, COMMISSIONERS CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FOR THE FIRST DISTRICT
Defendants in Error

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS THE WRIT FOR LACK OF JURISDICTION OR TO AFFIRM JUDGMENT BELOW

[redacted]
Counsel for Defendants in Error

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Supreme Court of the United States

HE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* NEW YORK AND QUEENS GAS COMPANY, Plaintiff in Error *against* OWARD E. McCALL, *et al.*, Commissioners, constituting the Public Service Commission of the State of New York for the First District, Defendants in Error	October Term, 1916. No. 943

EPLY BRIEF OF THE DEFENDANTS IN ERROR IN SUPPORT OF THE MOTION TO DISMISS THE WRIT OF ERROR OR TO AFFIRM JUDGMENT BELOW

After the filing of the motion to dismiss the writ of ror, the undersigned became counsel for the Public ervice Commission for the First District, of which the embers at the time the action under review was insti-ted in April, 1915, are the defendants in error. Pres-t counsel for the Commission respectfully asks leave file this brief memorandum by way of comment upon rtain contentions set out in the brief of the plaintiff error in opposition to the motion to dismiss—to the nd that there may be pointed out perhaps more

clearly the very narrow question indicated by the single assignment of error and the grounds of belief that the alleged Federal question is so plainly frivolous and unsubstantial as to present no issue on which this Court could do other than affirm the unanimous judgment of the Court of Appeals of the State of New York.

That an order made by the Commission in March, 1915, and unanimously upheld by the highest Court of the State in October, 1916, requiring the plaintiff in error to furnish gas service within its own exclusive franchise area in the City of New York, to certain consumers who have no other source of supply, remains unenforced and uncomplied with in May, 1917, is respectfully suggested as reason for close scrutiny as to whether a substantial Federal question is possibly presented for consideration in the event the motion to dismiss the writ is denied and the writ is left to be heard in the regular course.

The Single Assignment of Error

The single assignment of error on which the plaintiff in error seeks further to delay, or altogether to prevent, the going into effect of the Commission's order, reads as follows:

> "That the order of the Public Service Commission of the State of New York for the First District, made March 19, 1915, was illegal and void, in that it deprived the above named New York & Queens Gas Company of its property, without due process of law, and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the said Company to

> extend its distributing system, under great physical difficulties and at enormous expense, to an independent and remote community which the said Company was under no present duty to supply with gas, where it appeared that the said Gas Company would not obtain an adequate return upon the expenditure required to make such extension."

Reviewable issues to sustain this scanty assignment or present a substantial Federal question are not within the pages of the record at bar:

1.—It may first be noted that there is no claim that the plaintiff-in-error did not have a fair, full hearing on the merits, in the State Courts or before the Commission; no claim that the order was made or unanimously affirmed without evidence to authorize and support it; no claim that the Commission was lacking in jurisdiction of the subject-matter or power to make an order requiring such an extension of gas service within the plaintiff's franchise territory; no claim that the Commission's determination or the subsequent judicial review omitted any requirement of due process. How far the State Courts are to be, or have been, given power by State statute to review the *wisdom* and *expediency* of service orders made by a Public Service Commission, is a matter of State procedure and policy (*Louisville and Nashville R. R. Co.* v. *Garrett,* 231 U. S., 298, 314), and the correctness of the construction given to a State statute by the highest Court of the State does not raise a Federal question. Nor does the fact that by the decision under review the State Court adopted for the first time fully the salutary Federal rule as to the permissible scope of judicial re-

view of Commission orders, give support to the assignment of error at bar.

2.—The allegation of the assignment of error that the Commission's order would require the company to extend its distribution main "to an independent and remote community which the said company was under no present duty to supply with gas," is in nowise presented by any issues reviewable in this Court. The residential communities of Douglaston and Douglas Manor, to which the order relates, are *within the limits of the City of New York,* as well as within the area for which the plaintiff-in-error sought and obtained a franchise. The area is already served by other franchise-holding utilities—electric lighting, telephone, telegraph, water, trolley, and railroad. The construction of the company's franchise from the State and the scope of its duty to fulfill its franchise obligations are questions for the State Court, and its determination has traditionally been followed in this Court. The Court of Appeals of the State of New York held (R., p. 282), that the area of 332 houses to be served was "covered by the relator's franchise," that "the occupants of these houses can get no gas unless they are supplied by the relator," and that "it is the duty of the relator to supply their needs if practicable." That ruling is not reviewable here, and leaves the assignment of error without support. Perhaps no better comment could be made upon the whole assignment of error, and the company's refusal to perform its franchise obligation, than is afforded by the fact that (R., pp. 22, 78, 79) the company offered to make the extension and afford the service if the property owners would band together and deposit $10,000 with this important metropolitan sub-

sidiary of the Consolidated Gas Company, such deposit to be repaid at the rate of twenty-five per cent of the gas bills in each year, until the whole sum was repaid to the depositors. The community was not so "independent and remote" and the "physical difficulties" were not so "great" or the "expense" so "enormous," that the company would have been unwilling to live up to what the New York Court of Appeals has held to be its "duty," if only the 332 home-owners had acquiesced in its suggestion that they temporarily deposit $10,000 with the company, to be repaid as money came in from gas bills! Under such circumstances is this assignment of error laid and this Court asked to review the unanimous determination of the highest Court of the State of New York.

3.—The sole phase remaining which, on its face, could suggest a Federal question is presented by the averment that "the said gas company would not obtain an adequate return upon the expenditure required to make the extension."

The Record Raises No Federal Question

The point here insisted upon in behalf of the motion to dismiss the writ is that assuming that the plaintiff in error adequately asserted the unconstitutionality of the Commission's order at every stage of the State proceedings, the record falls far short of containing the evidence essential to present the question whether the Commission's order can be regarded as "confiscatory." It is not enough that the Federal question be *asserted,* although even of its adequate assertion below there may be doubt here; but the question is available for review

in this Court only if the plaintiff in error can disclose the presence in the record of the *facts* which have to be at hand to enable a judicial consideration of that issue.

The company says that the Court of Appeals of the State of New York violated a constitutional right in requiring the company to make, under its franchise, an extension which the company does not deem would yet prove remunerative, and that judicial denial of the right of a franchise-holding corporation to "pick the fat and leave the lean" presents a Federal question.

In determining the reasonableness of a service order under review, the probable income from the extension and the probable net earnings upon the capital outlay required for such an extension, are of course factors to be taken into account. But they are not the only factors, and they are not determinative of the issue whether the order is to be condemned in this Court as confiscatory.

The plaintiff in error says that the extension which it was willing to make promptly if the 332 householders would temporarily deposit $10,000 to be repaid as gas bills came in, would yield at the outset no more than two and one-half (2½) per cent. upon the expenditure required for the making of the extension, and that any further return would come only as the community increased in population. The Company admits an assured return from the outset of two and one-half (2½) per cent. upon the outlay; the Commission calculated that the extension would earn four (4) per cent. from the start; the Court of Appeals said that, under all the circumstances, even an initial return of two and one-half (2½) per cent. upon a new extension into a franchise area was "very far" from showing "an arbitrary and capricious

exercise of power." But even in this calculation of probable earnings, many of the vital factors are not taken into account. For example, the same extension which the company says would enable it to earn two and one-half (2½) per cent. through serving the 332 homes of Douglaston will enable it, with little additional outlay except for mains into houses, to serve also a developing intermediate area ten times as large as that of Douglaston.

The very theory of the obtaining of franchises for service in newer areas is that extensions shall be made as public needs require, even in advance of the time when an adequate rate of return on the cost of the particular extension can be assured from the day the connections are made. The record at bar does not contain the facts on which any Court could conclude that the requirement of the extension under consideration would deprive the company of constitutional rights.

IN THE ABSENCE OF EVIDENCE AS TO THE FAIR VALUE OF THE ENTIRE PROPERTY OF THE COMPANY USED IN THE PUBLIC SERVICE AND THE RATE OF RETURN THEREON, AND IN THE ABSENCE OF EVIDENCE THAT THE EXPENDITURE FOR THE EXTENSION WOULD SO INCREASE THE TOTAL VALUE OF THE PROPERTY WITHOUT COMMENSURATE INCREASE IN ITS EARNINGS AS TO RESULT IN LESS THAN A FAIR RETURN ON THE ENTIRE PROPERTY, INCLUDING THE EXTENSION, NO ISSUE IS PRESENTED FOR THIS COURT OR BASIS MADE FOR REVIEW OF THE DETERMINATION OF THE STATE COURT THAT THE EXTENSION WAS REASON-

ABLE AND A LAWFUL FULFILLMENT OF FRANCHISE OBLIGATIONS.

The necessary basis of this Court's consideration of the confiscatory character of an order for additional service by a public utility has been clearly set forth in Atlantic Coast Line *v.* N. Car. Corp. Commission (206 U. S., 1, 24, 26), where an order was attacked on the ground that the additional facility would not itself afford an adequate return on the outlay. This Court, however, said:

> "Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

The same rule has been declared in:

> St. Louis and San Francisco Ry. Co. *v.* Gill, 156 U. S., 649, 655;
> St. John *v.* Erie Ry. Co., 22 Wall, 136, 149;
> Minneapolis and St. L. Ry. Co. *v.* Minnesota, 186 U. S., 257.

There is no evidence in the record at bar showing the fair value of the Company's property, and no claim made that the company's total earnings would be impaired or

its large "divisible surplus" destroyed, were this extension at last required.

Under all the circumstances, it is urged that the Federal question asserted by the single assignment of error is not substantial. Whether the State, in pursuance of its public policy and in construction of franchises granted by it, should require an important and prosperous subsidiary of the Consolidated Gas Company to spend a few thousand dollars to make a short extension in fulfillment of a franchise obligation, sooner than the company wished to make the particular extension (unless, forsooth, the householders would submit to a "hold up" in the form of an arbitrary requirement of a temporary deposit), is from no point of view a Federal, or even a judicial, question, but solely a matter of State administrative policy, with which this Court cannot be seriously asked to concern itself, particularly at the instance of a plaintiff in error who even failed to place in the State record the elements of proof which this Court has reiteratedly indicated must appear where a claim of confiscation is to be urged.

The unusual importance to the State of an early and favorable determination of this matter will sufficiently appear from a reading of the unanimous opinion of the Court of Appeals of the State of New York. This case is vital to the efficiency of expert regulation in the public interest, as the desirable alternative of the casual directions of legislatures. If the enforcement of administrative orders of a State commission, dealing only with a minor extension which would in no perceptible way affect the earnings of the plaintiff in error or the total of its property used in the public service, can be delayed

for years by the simple expedient of assertion of the existence of a Federal question, then the usefulness and efficacy of regulation through reasoned adjudication is greatly impaired. As it is manifest that the question here asserted is frivolous, the motion to dismiss the writ, or to affirm the judgment below, should be granted, and the disposition of the case be not delayed until the matter of this 1915 order of the Commission is reached in its regular course upon the docket of this Court.

The Principal Authority Relied on by the Plaintiff in Error

The authority almost solely relied upon by the plaintiff in error is *Oregon R. R. and N. Co.* v. *Fairchild* (224 U. S. 510), but an examination of the opinion of Mr. Justice Lamar in that case discloses little of aid to the present assignment of error. The order scrutinized in the Fairchild case was a sweeping direction for the construction of track connections between various railroads, at numerous points where the railroads were not physically connected and had not contemplated ever being connected. The order was based palpably on a theory that adjacent railroads should be connected by tracks whenever they ran near each other at shipping points, and this Court found and observed (p. 532) that "here there was *no evidence whatever* warranting a finding that there was *any public necessity* for the track connections." There had not even been any requests, any public demand, for the connections; it did not appear that any one needed them or would be better served if they were built.

The opinion carefully distinguishes (p. 529) between

a situation in which, as here, the added facility is requisite to the furnishing of service at all and the furnishing of such service is a fulfillment of a public duty or franchise obligation. The opinion lays down a rule of emphasis on expense only "where the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties" (p. 529). The Court explicitly refrains from limiting in any way the force of such decisions as Atlantic Coast Railroad Company *v.* North Carolina Corporation Commission (206 U. S., 1, 27), Missouri Pacific Railway Company *v.* Kansas (216 U. S., 262), Minneapolis and St. Louis Railway Company *v.* Minnesota (193 U. S., 53), and laid down no intimation that there is a question for Federal review where the facility ordered was necessary for the furnishing of a franchise service to a portion of the public who otherwise would have no service at all, and where the evidence taken at a fair hearing before the State tribunal clearly showed the need for such facility and service, with no accruing disadvantage to the company, except that at the beginning, the earnings from the service first afforded from the additional facility would be no more than 2½ to 4 per cent. upon the cost of the facility itself.

Respectfully submitted,

WILLIAM L. RANSOM,
GODFREY GOLDMARK,
Of Counsel for the
Defendants in Error.

Dated, May 19, 1917.

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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. [redacted] 407

THE PEOPLE OF THE STATE OF NEW YORK EX REL. NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in Error,

vs.

EDWARD E. McCALL ET AL., Commissioners, constituting the Public Service Commission of the State of New York, for the First District,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR, in opposition to motion to dismiss.

JOHN A. GARVER,
Counsel for Plaintiff in Error,
55 WALL STREET,
New York.

C. G. BURGOYNE PRINTING BUSINESS, 72-78 Spring St., New York.

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Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 943.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL., NEW YORK AND QUEENS GAS COMPANY,
Plaintiff in Error,

vs.

EDWARD E. MCCALL ET AL., Commissioners, constituting the Public Service Commission of the State of New York, for the First District,
Defendants in Error.

Brief for plaintiff in error, in opposition to motion to dismiss.

FIRST.

The Constitutional question.

The plaintiff in error contends that the order of the Public Service Commission, requiring it to "extend" its distributing system to another distinct and independent community, remote and isolated from the community which it now serves, and which it owes no present obligation to serve, deprives it of its property without due process of law; it being conceded

by the Commission and found by the State Courts, that the return upon the investment would not be more than about 2½%, upon the most favorable view of the facts (Record, p. 277), while, upon the evidence given by the Company's engineer, the return would be less than 1% upon the investment (fols. 305, 797).

The plaintiff in error also contends that the Commission, in rendering its decision, did so in complete disregard of the evidence and upon the assumption of an irrelevant fact which did not in reality exist.

The evidence in support of these contentions will be referred to later.

SECOND.

Regulation of public utilities must be reasonable.

The power to regulate public utilities, whether exercised directly by the legislature or through a commission, can be exercised only in a manner that is fair and reasonable to the business regulated, as well as to the public. An order requiring an expenditure of money for the connection of railroad tracks, or the extension of the distributive system of a gas company, is not a mere administrative regulation, but is a taking of property; and if the regulation is not reasonable, the company affected by it is deprived of its property without due process.

Southern Pacific R. R. Co. v. Commissions, 78 Fed., 260 (McKenna, J.);
Railroad Commission cases, 116 U. S., 307;
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San Diego Land Co. v. National City, 174 U. S., 739, 753;
Chicago, etc., Ry. v. Tompkins, 176 U. S., 167;
Cotting v. Kansas City Stock Yards Co., 183 U. S., 79;
Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510, 523–4, 530–1;
Northern Pacific Ry. v. North Dakota, 236 U. S., 585, 595, 598.

In Cotting v. Kansas City Stock Yards Co., Mr. Justice BREWER, in writing for a unanimous Court, after reviewing the decisions, said (p. 91):

> "As to those individuals and corporations who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further rule than that the State may prescribe and enforce *reasonable* charges."

THIRD.

The question of reasonableness is a judicial question.

I. If an unreasonable regulation constitutes a taking of property without due process of law, it necessarily follows that the question of reasonableness is one for the courts to determine; and this Court has frequently recognized that this is so.

Louisiana etc. Ry. v. The State, 85 Ark., 12;
Chicago, etc. Ry. v. Minnesota, 134 U. S., 418, 458;

Reagan v. Farmers Loan & Trust Co., 154 U. S., 362–379;
Wisconsin R. R. v. Jacobson, 179 U. S., 287, 301;
Smyth v. Ames, 169 U. S., 466, 527;
Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510.

In Chicago, etc. Ry. v. Minnesota, the Court said (p. 458):

> " If the company is deprived of the power of charging *reasonable* rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect of the property itself, without due process of law."

And, in a concurring opinion, Mr. Justice MILLER said (p. 461):

> " But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of the court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which *I have pointed out as judicial questions.*"

In Reagan v. Farmers Loan and Trust Company, the Court said (p. 397):

> " Still there can be no doubt of either the (courts') power *and duty* to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work the practical destruction of rights of property, and, if found so to be, to restrain its operation ".

In Smyth v. Ames, the Court said (p. 527):

> " No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the

> Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to the contrary, notwithstanding".

A commission created by the legislature has, of course, no greater powers or discretion than the legislature itself.

In Oregon R. R. & Nav. Co. v. Fairchild, the Court said (p. 528):

> "The question presented is whether, *as matter of law*, the facts proved show the existence of such a public necessity as authorized a taking of property".

II. Independently of the fact that the decisions of this Court on Federal questions constitute the supreme law of the land, the New York Court of Appeals has recognized the principle, that the test of the validity of a regulation in the exercise of the police power of the State is its reasonableness, which is "always subject to judicial scrutiny".

Forster v. Scott, 136 N. Y., 577, 584.

FOURTH.

The Court of Appeals erred in holding that the question of reasonableness was not a judicial question.

I. When this case was brought to a hearing, upon a writ of *certiorari*, before the Appellate Division of the Supreme Court, that Court (five Justices) unanimously set aside the order of the Commission (p. 278), holding that it was the duty of the Court to determine the question of reasonableness. The Court said (pp. 276–7):

> "We have no doubt that under this law the question remains for the Court to determine, upon the re-

> view of the determination of the Public Service Commission, whether the extension ordered was a reasonable extension. This question must be considered in the aspect, first, of the needs of the community, and, second, of the burden placed upon the Company."

II. The Court of Appeals held that this view of the right and duty of the Court was erroneous; and, for that reason, it reversed the order of the Appellate Division. As to this, the Court of Appeals said (p. 280):

> "In applying the provisions of this statute, the Court at the Appellate Division said, 'We have no doubt that under this law the question remains for the Court to determine, upon the review of the determination of the Public Service Commission, whether the order was a reasonable extension.' This statement of law is quite likely to create a misapprehension as to the power of the court. The court has no power to substitute its own judgment of what is reasonable in place of the determination of the Public Service Commission, and it can only annul the order of the Commission for the violation of some rule of law."

The rule of law which the Court felt itself bound to follow was the State statute, providing for the review of a determination of an inferior tribunal by a writ of *certiorari*.

III. The provision of the Public Service Commissions Law, under which the order of the Commission was made, is as follows:

> "To order *reasonable* improvements and extensions of the works, wires, poles, lines, conduits, ducts and other *reasonable* devices, apparatus and property of gas corporations, electrical corporations and municipalities."

Apparently, because the statute employed the word "reasonable", the Court of Appeals assumed that the question of reasonableness was one of statutory construction only, and not one of constitutional right, and that what the Commission thought was reasonable must be accepted as reasonable, if there was any evidence to support its finding.

Even, however, if the word "reasonable" had been omitted from the statute, the constitutional right of the Gas Company to the protection of its property would have been just as complete. It was not a question of statutory construction at all; it was the great constitutional question, whether the regulation complained of did unduly interfere with the property rights of the Gas Company. The Appellate Division was right and adopted the view repeatedly expressed by this Court, in holding that it was for the Court to determine the question of reasonableness; and the Court of Appeals was wrong in holding to the contrary, and thus denying the plaintiff in error the protection which it claimed under the Federal Constitution.

FIFTH.

Oregon Railroad and Navigation Co. v. Fairchild (224 U. S., 510).

The case of the Oregon Railroad and Navigation Company v. Fairchild, which has already been referred to, was decided by a unanimous Court, and is decisive upon practically every point involved in the case at bar. It was brought to this Court by writ of *certiorari* to the Supreme Court of the State of Washington, to review a judgment affirming the judgment of the Superior Court, which dismissed a petition for the review of an order of the Railroad Commission, directing certain Railroad Companies to make connection between their tracks, at certain specified points. It was claimed by the plaintiff in error that the State statute failed to furnish an adequate hearing or opportunity for judicial review, that there was no sufficient evidence of a public necessity, and that the order was void as taking property without due process of law.

The Supreme Court of the State confined its attention to the State statute (52 Wash., 17), and held that the Railroad Commission Act did afford a proper hearing and judicial review and that it would not disturb the findings of the Commission if supported by evidence. The Court was impressed (p. 30), just as the Court of Appeals was in the case at bar (Record, p. 282), with the fact that the Commission was "a mediatory court, standing between the private interests of the country and the interests of the carriers"; and it did not consider at all the Federal question, that if no public necessity was shown and no duty owing to the public under the particular circumstances, the action of the Commission deprived the Companies of their property without due process. In other words, the decision of the State Court, in that case, was based solely upon the construction which it placed on the State statute.

This Court adopted the view of the State statute taken by the State Court; but it reversed the judgment, on the ground that the Railroad Commission did not sustain the burden which rested upon it, of showing the public necessity, and that the order made by the Commission did result in taking property without due process. In the course of its opinion, this Court laid down the following propositions:

1. The order requiring the track connection was not a mere administrative regulation, but was the taking of property. As to this, the Court said (p. 523):

> "The Commission's order requiring the Oregon Company to make track connection, was not a mere administrative regulation, but it was the taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and

unreasonable, or was justified by the public necessity which the carrier could lawfully be compelled to meet * * *. Where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as matter of law, the order was so arbitrary, unjust or unreasonable, as to amount to a deprivation of property, in violation of the Fourteenth Amendment."

2. The power conferred by the statute upon the Commission, to require additional connections to be made, did not authorize the Commission to compel railroad companies to build connections where the tracks were at a distance from each other; nor even where they were close together, if the business to be done or the number of persons to be served would not justify the expenditure (pp. 528–9).

3. The burden was on the Commission to show the necessity of the act which it required to be done. No presumption arises that the tracks of railroad companies shall be connected simply because they are near each other and because the Commission has power to order connections to be made (pp. 530, 531, 533).

4. The corporation to be regulated must not only have had an opportunity to be heard, but *the decision of the Commission must be based on the evidence.* A hearing is not a mere form. The tribunal is bound not merely to receive evidence but " to give effect to what has been established " (p. 525). On this point, the Court said :

" If no evidence whatever had been offered, the order could not have been granted, or, if granted, would *necessarily* have been set aside by the Court on the hearing of the petition for review, because there was no proof of the fact on which the order could issue taking the defendant's property. The same result must have followed if the testimony that was so submitted to the Commission was insufficient to establish the existence of the public necessity alleged to exist."

The expenditure in that case was insignificant, in comparison with that directed to be made in the case at bar. The Railroad Commission found that the total cost to all three of the Railroad Companies would be only about $7,000, as against the $60,000 to $70,000 found by the State courts in the present case (p. 282).

SIXTH.

Jurisdiction of this Court to review decisions of State courts.

Counsel for defendants in error contend, in their Second Point (p. 16), that because the constitutional question was not expressly considered and passed upon by the State court, this Court is, therefore, without jurisdiction to review the decision.

All that is necessary to confer jurisdiction upon this Court, in a case of this kind, where the State court has not expressly considered and passed upon the federal question, is that the attention of the State court should have been called to the right claimed under the Federal Constitution and that the decision of the State court necessarily involved a denial of that right.

Roby v. Colehour, 146 U. S., 153, 159.
Chicago, etc., R. R. Co. v. Chicago, 166 U. S., 226, 231.
Dewey v. Des Moines, 173 U. S., 193, 199.
National Mutual B. & L. Ass'n v. Brahan, 193 U. S., 635, 646.

In Chicago, etc., R. R. Co. v. Chicago, the Court said (p. 231):

> "It is true that the Supreme Court of Illinois did not, in its opinion, expressly refer to the

> Constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this Court to re-examine the final judgment of the State Court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant, for that judgment could not have been rendered without deciding adversely to such claims of right."

This Court can no more be deprived of jurisdiction by the fact that the State court has ignored the Federal question than it can be given jurisdiction by a certificate of the State court that the question was raised and passed on, where that was not actually the fact.

Powell v. Brunswick County, 150 U. S., 433.

This general principle has been affirmed many times, in decisions holding that, where the State courts have given effect to legislation claimed to impair the validity of a prior contract, this Court has jurisdiction to review such decision, even though it was placed on the ground that there was no contract right to be impaired; it being necessary to review the decision as to the existence of a contract right and examine the facts, in order to ensure the preservation of the constitutional right that it should not be impaired.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 443.
Bridge Proprietors v. Hoboken, 1 Wall., 116, 143.
McCullough v. Virginia, 172 U. S., 102, 117.
Louisiana Ry. & Navigation Co. v. New Orleans, 235 U. S., 164, 171.

II. No particular phraseology is required in asserting the Federal right in the State court, so long as it actually is set up in such manner as to bring the subject to the attention of the court.

Green Bay, etc., Canal Co. v. Patten Paper Co., 172 U. S., 58, 68;
Dewey v. Des Moines, 173 U. S., 193, 199.

In the latter case, the Court said (p. 199):

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the State court which at least would call its attention to the Federal question, as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient."

SEVENTH.

Constitutional question duly called to the attention of the State courts.

Counsel for defendants in error also contend that the Federal question was not properly raised in the State courts (Brief, p. 17). They concede (p. 18) that the question was raised in the petition to the Commission for a rehearing, that it was again raised upon the application to the Supreme Court of the State for a writ of *certiorari* to review the order of the Commission, and again, in the Court of Appeals, upon the motion for a reargument.

This concession could not be avoided, in view of the explicit showing on that point of the Record (fols. 38, 111, and p. 298).

The first opportunity to raise the question in the courts was in the petition to the Supreme Court for the writ of *certiorari*, where it was alleged (fol. 38):

> "2. That said order is illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it deprives your

> petitioner of its property without just compensation, and denies to your petitioner the equal protection of the laws."

The defendants in error were the appellants in the Court of Appeals; and the only opportunity for the Gas Company to raise the constitutional question in that Court, aside from the oral argument and the brief, was in the application for a reargument, where the constitutional ground was thus set forth (Record, p. 298).

> "(*e*) That since, upon all the evidence, the said extension was clearly unreasonable, and it was conclusively established that the relator would not receive an adequate return on its investment therein, a construction of Section 63 of the Public Service Commission Law which would leave the question of reasonableness entirely to the determination of the Public Service Commission, would render that statute unconstitutional, both under Article First, Section 6 of the Constitution of the State of New York, and the Fourteenth Amendment of the Constitution of the United States, since it would permit the relator to be deprived of its property without due process of law."

It was not possible for the plaintiff in error to do anything more in the way of asserting its constitutional rights. It asserted them at every possible opportunity; and that was enough.

Chicago, etc. R. R. v. Chicago, 226 U. S., 226, 231.

In the petition for the writ of error to the Chief Judge of the Court of Appeals, it is expressly alleged that the constitutional question was urged both upon the Appellate Division and the Court of Appeals, in the briefs submitted by counsel for the Company (Record, p. 287). This averment is not disputed in the moving papers herein; and it was personally known to be true by the Chief Judge, so far as the Court of Appeals was concerned.

EIGHTH.

Constitutional question necessarily decided by the Court of Appeals adversely to the right claimed by the plaintiff in error.

As we have already seen, the Court of Appeals necessarily decided the constitutional question adversely to the right claimed by the Gas Company, in holding that the question of reasonableness was a question of fact for the Commission to decide and that if there was any evidence to sustain the finding of the Commission, the Court would not interfere. The Court of Appeals thus disregarded the principle that has so many times been enunciated by this Court, that no regulation of a public utilities is constitutional, unless it is reasonable, and that the Court will determine for itself, on all the facts, the question of reasonableness.

Under the decision of the Court of Appeals in this case, the business policy of all public utilities in the State of New York would virtually be controlled by three out of five Commissioners, who might know little about the details and ramifications of the business, but whose discretionary power could not be controlled, if there was any evidence tending to support its exercise, and whose judgment might be influenced largely by political or other irrelevant considerations. This would clearly be to substitute a government of men for a government of law.

NINTH.

All the evidence totally ignored by the Commission, which based its decision upon the irrelevant and unfounded assumption of a non-existent fact.

A more flagrant case of the entire disregard by a commission of all the evidence has probably never been brought to the attention of a court. Not only did the Commission in the present case disregard the facts that were presented to it for consideration, but the decision of a majority of the Commission (three out of five), was based upon the assumption of an irrelevant fact (fols. 149–151) that had absolutely no existence; and the record shows, as will be pointed out, that the decision of the fourth member (Commissioner Maltbie), who wrote an opinion (p. 61), was primarily influenced by this same irrelevant and non-existent fact (fols. 74–5). The Chairman of the Commission voted against the order as unreasonable (fol. 149).

The conduct of the Commission in this case must necessarily lead this Court to set aside the order complained of, as was expressly recognized by it in the Oregon Railroad and Navigation case, where the Court said that the Commission was bound not merely to receive the evidence, but "to give legal effect to what has been established" (224 U. S., 510, 525); and as to making a decision without any evidence to sustain it, the Court said (pp. 530–1):

> "If no evidence whatever had been offered, the order could not have been granted, or if granted, would *necessarily* have been set aside by the Court on the hearing of a petition for review, because there was no proof of the fact on which only the order could issue taking the defendant's property."

The undisputed facts furnish the most complete demonstration that a majority of the Commission in the present case not only failed to give legal effect to the evidence, but that the order was made precisely as if no evidence at all had been presented to the Commission.

Some time before the hearing, the Consolidated Gas Company of New York had obtained leave from the Commission to purchase the stock of the plaintiff in error. In the present case, four of the five members of the Commission assumed that the Consolidated Gas Company had represented at that time that, if it were permitted to purchase the stock of the plaintiff in error, it would be able to finance all extensions of the distributive system of the plaintiff in error. From this assumption, the Commission in the present case concluded that the Consolidated Gas Company had undertaken to finance "just such extensions" as the one directed, and that the plaintiff in error was, *therefore*, obliged to make this extension so-called, without regard to other considerations.

Of course, the promise of the Consolidated Gas Company (even if there had been proof that it had been made, which was not the case), could not enlarge the powers of the Commission to order a reasonable extension or deprive the plaintiff in error of its constitutional rights. The evidence would have to be very clear and convincing to show that a corporation had agreed to finance *all* future extensions of another corporation, whose stock it had acquired, whether such extensions were reasonable or not.

The undisputed evidence in the present case, produced by Commissioner Maltbie himself in the course of his opinion (fol. 77), so far from establishing the fact that the Consolidated Gas Company had promised to finance all extensions of the plaintiff in error, shows beyond the possibility of question that the Consolidated Gas Company made its position absolutely clear to the Commission, upon its application to acquire the

stock of the plaintiff in error, in stating that it would not undertake to finance any extensions, unless they would pay a return upon bonds at par. Commissioner Maltbie produced the unimpeachable evidence on this point, by quoting from the opinion which he had written on the previous application referred to, when the Consolidated Gas Company had applied for permission to purchase the stock of the plaintiff in error. The following is an extract from Commissioner Maltbie's opinion on that occasion (fol. 77) :

> "It is apparent, further that if the Queens Company is controlled by the Consolidated Gas Company, the policy upon this point will not be more liberal, for Mr. Carter, who is one of the vice-presidents and secretary of the Consolidated Gas Company, and *who was the only witness for the petitioner in this proceeding*, said that, unless the expenditures for additions and extensions of its (the company's) property will pay a return upon bonds at par, they should not be made. In other words, unless an extension will pay its carrying charges, it ought not to be built."

II. Inasmuch as the Consolidated Gas Company never undertook to finance such undertakings as this, required to serve an independent community at a very great relative outlay that would produce no adequate return, it is scarcely conceivable that the decision of a majority of the Commission should have been based upon that irrelevant and unfounded assumption. But the record is absolutely clear on the point.

1. Here is the statement of Commissioner Williams (fols. 148–150) :

> "Record me in the affirmative, *for the reason* that, when the stock of the company was acquired by the Consolidated Gas Company of New York, one of the arguments used on behalf of the applicant was that *just such extensions* as this could be made if the company were controlled by the larger company, on account of the larger company being better able to finance, and that it was also stated in that hearing that many mains would have to be built which would not pay a return for some time. This, I believe, is one of them."

2. Commissioner Cram was to the like effect (fols. 150–1):

"I would like to be recorded as voting 'Aye' for substantially the same reason, because they said that, if consolidation were allowed, it would be in the public interest because they would have more capital and more money and would provide better gas whether it was profitable or not when the people wanted it, with a view to building up the neighborhood. *Consequently*, I think the order directing the mains to be built should be approved."

3. And Commissioner Wood concurred (fols. 151–2):

"I agree with Commissioners Cram and Williams in the opinions they have expressed, and believe those people should have gas, and this is the only means of getting it."

4. Commissioner Maltbie, who opened and closed the hearings and heard the arguments of counsel, wrote an opinion of fourteen pages (fols. 62–104), in which he devoted only four pages (fols. 94–104) to any discussion of the estimated cost and return. But he, too, was evidently influenced primarily in his decision by what he conceived to be the obligation of the Consolidated Gas Company, to which he devoted nearly four pages of his opinion (fols. 72–82). It is very evident that he was quite as much influenced by what he considered to have been the promise of the Consolidated Gas Company as were any of the other three Commissioners who voted with him. This appears very emphatically in his opinion (fol. 74):

"In view of the statements made by the representatives of the Consolidated Gas Company in another case, it is surprising that the present management of the New York and Queens Gas Company has refused to extend its mains to Douglaston."

That this was a settled conviction in his mind is apparent from his attitude throughout the case. The first hearing was in midsummer (July 29, 1914; fol. 167). The notice of hearing had not been mailed until Friday, July 24, and Mr. Spear, the General Manager, did not receive the notice until Tuesday, July 28, having previously gone away on his vacation. An application for an adjournment of two weeks (fols. 170–1) was denied (fol. 172); and the examination of complainants' witnesses proceeded forthwith. At the close of this examination, Commissioner Maltbie, ignoring the previous application for an adjournment, inquired (fol. 225):

"Has the Gas Company anything?"

Upon the renewal of the request for a fortnight's adjournment, owing to the absence of the General Manager (who is also the engineer of the Company; fol. 378), and after showing great reluctance to grant any adjournment, Commissioner Maltbie said (fol. 228):

"You know the Consolidated Gas Company owns the stock of this Company, and one of the arguments put forth with a great deal of force when they wanted to buy this stock was that they would furnish money to finance this Company, that they would not have any trouble and that the company, unless the stock was purchased by the Consolidated Gas Company, would have trouble financing extensions. Now, it seems to me rather queer that at the first complaint that is made to us regarding extensions over in your territory, the company does not want to provide the money to make the extensions. Now, if the public is to get any good out of the transfer of the ownership of stock to the Consolidated Gas Company, now is the time to make good."

An adjournment of two weeks and one day, to August 13, was finally reluctantly granted (fol. 224), it appearing that Mr. Spear would return

from his vacation on the adjourned day (fol. 243); and, at the suggestion of counsel for the complainants, that the hearing should then proceed peremptorily, Commissioner Maltbie said (fol. 247):

"There is no excuse for them not appearing on the 13th and proceeding with this case immediately."

He could not dismiss the subject without another reference to the Consolidated Gas Company, as he said (fol. 224):

"I shall probably not be here myself, and perhaps, before I leave, that admonition may be repeated, that when the Consolidated Gas wanted to purchase the stock, and I voted against that proposition, one of the arguments that was made very strong with me, was that the Consolidated Gas Company would furnish plenty of money to finance extensions, and the people over there could not get extensions unless the Consolidated Gas furnished them."

Again, on the final argument and submission of the case, he said (fol. 715):

"Yes, and Mr. Carter stated, in his application for the Consolidated Gas Company, to buy the stock of this company and of the electric lighting companies, that your capacity was already taxed, and it needed finances to carry the company on, and that they were going to put in a bigger amount of money, and that the Consolidated Gas Company were going to put in money —you cannot use that argument very effectively with me."

And again, he broke into the argument, as follows (fol. 733):

"The Consolidated Gas Company is in back of this company now. If this were the old company, with its so-called feeble ability to finance, we might consider that of some force; but the Consolidated Gas Company is back of this Company now, with a large surplus."

Not one of these statements was justified, as appears by the statement of Commissioner Maltbie himself, heretofore referred to (*ante*, p. 17).

III. It is thus absolutely demonstrated, that the order of the Commission was in utter disregard of the evidence in the case and upon the assumption of an irrelevant fact which had no existence except in the imaginations of the Commissioners.

TENTH.

The act directed to be done not an extension, within the meaning of the statute.

I. In determining the validity of the order of the Commission, this Court will primarily consider whether the Commission had any power to direct the so-called extension. The Commission had no greater power than the Legislature to direct an act and call it an extension, when, in reality, it was no extension at all.

In the Oregon Railroad and Navigation Company case (*supra*), the statute authorized the Railroad Commissioners to require railroad companies to make additional connections between their tracks. But this Court said that the language employed did not authorize the Commission to require railroad companies to make connections where the tracks were at a distance from each other (224 U. S., 510, 528).

II. What the New York Legislature meant by the use of the word "reasonable", in the statute authorizing the Public Service Commission to order "reasonable improvements and extensions" of the works, conduits and other appliances of a gas company, was some improvement or betterment of *existing* facilities maintained for the service of the public. It did not mean new construction for the service of another community which had no claim upon the Company.

The Public Service Commissions Law (L. 1907, Ch. 429) did not originally confer any power upon the Commission to order extensions of mains. This power was not conferred until 1910 (L. 1910, Ch. 480). Prior to 1910, the only statutory requirement relating to the extensions of mains or services was that contained in Section 62 of the Transportation Corporations Law, which required a gas company to supply gas to any owner or occupant of premises within one hundred feet of a main; and the statute empowered the Company to require the plaintiff to deposit a sum sufficient to cover the cost of the connection on his premises. That provision was first enacted in 1859 (L. 1859, Ch. 311, Sec. 6). For half a century, therefore, it expressed the well-settled policy of the State in regard to compulsory extensions. In other words, prior to 1910, no one could compel a gas company to extend its connections to his premises, unless the premises were within a hundred feet of the main, and not then unless he paid for the cost of the connection. What was considered to be a reasonable extension prior to 1910 was, therefore, one hundred feet.

When the Legislature enlarged the powers of the Commission, by authorizing it to order "reasonable" extensions, it did not repeal the above provision; and it is to be presumed that it did not intend to revolutionize the long-settled policy of the State in this respect, but that it did intend to confine the power, within strictly reasonable limits, to the immediate community in which the company was operating. It certainly did not contemplate construction into distant and isolated territory, which could never become an integral part of the existing territory supplied and which virtually would require the establishment of an entirely new and distinct business.

ELEVENTH.

Burden on the Commission to show the necessity of the so-called extension.

The presumption is all against an order of this kind, which, on its face, will not give an adequate return upon the investment; and the burden of proof was upon the Commission to show the necessity of the act which it required to be done.

> Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510, 530-1, 533.

In the course of its opinion in that case, the Court said:

> "The burden is on the Commission to establish the allegations in the complaint. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined at the hearing before it."

No attempt was made by the Commission in the present case to sustain this burden.

TWELFTH.

The order unreasonable.

I. That the order of the Commission under review was not a reasonable order will be evident from a consideration of the undisputed facts; and this Court will examine the facts to ascertain whether or not the order was reasonable, as it has invariably done in all the rate and regulation cases which it has been called to pass upon.

> Wisconsin, etc, Railroad Co. v. Jacobson, 179 U. S., 287, 297;

Knoxville v. Knoxville Water Co., 212 U. S., 1, 8;
Covington Turnpike Co. v. Sandford, 164 U. S., 578;
Chicago, etc. Ry. v. Thompkins, 176 U. S., 167, 172;
Atlantic Coast Line v. North Carolina Comm., 206 U. S., 1;
Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510, 528;
Northern Pacific Ry. v. North Dakota, 236 U. S., 585, 593.

This is also true of cases coming up from the state courts, where the conclusion of law affecting a Federal right is dependent upon the facts (*ante*, p. 11).

Kansas City Ry. v. Albers Comm. Co., 223 U. S., 573, 591;
Creswill v. Knights of Pythias, 225 U. S., 246, 261;
Louisiana Ry. Co. v. New Orleans, 235 U. S., 164, 170-1;
Northern Pac. Ry. v. North Dakota, 236 U. S., 585, 593, 595.

II. The order directed the Gas Company to extend its mains and services so as to serve a community on Long Island, in the Borough of Queens, New York City, known as Douglaston and Douglas Manor (fols. 58–9).

The manufacturing plant of the Company is situated in Flushing, about six miles from the nearest point in the Douglaston territory (fol. 298). That territory is far removed from the present scene of operations of the Gas Company, and is completely and permanently separated from the territory at present supplied, by a salt marsh, which, with the hills on each side of it, separates the Douglaston territory physically from the Flushing community (fols. 173–4, 297). This salt marsh can never contribute anything to the Company's business. It is about a mile wide by a mile and a half in depth, and is bisected by a navigable stream (fol. 179). It is crossed

by a highway, which is merely a causeway, paved with Belgian blocks (fols. 579–80). It is also crossed by a railroad. Both the causeway and the railroad cross the stream by drawbridges (fols. 179–80). A trolley railroad line is also operated upon the causeway. It is in this causeway that the proposed extended main directed by the Commission would have to be laid; and it would also have to be carried under the stream.

Without the evidence of any expert, the Court will see that an undertaking of this kind would be attended with great expense and exceptional engineering difficulties, to say nothing of the danger of electrolytic action affecting the pipes, by reason of the proximity of the trolley line and the salt water.

Moreover, the evidence is undisputed, that to lay a new main from Douglaston to connect with an existing main in Flushing would not answer the purpose; because, the existing main, which is entirely adequate for the present needs of the territory supplied (fols. 312–13, 366, 369), is only a four-inch main of low pressure, while, to comply with the order of the Commission, it would be necessary to lay a new high pressure main (which, for a portion of the way, would have to be a six-inch main) for the entire distance from the manufacturing works in Flushing to Douglaston (fols. 297–8, 301–2, 337, 339–41, 363, 404, 422); and it was estimated that to supply the entire territory adjacent to Douglaston would call for a total mileage of 86,948 feet (fol. 299), or about nineteen miles, consisting of eight miles of trunk mains and eleven miles of smaller mains (fol. 303). The total existing mileage of the Company, at the time of the hearing, was only ninety-nine miles (fol. 401); and the extension proposed would, therefore, at one stroke of the pen, add about twenty per cent. (fol. 767) to the existing distributing system, which it had required more than sixty years of continuous growth to bring to the present stage of development (fol. 406).

The officers of the Company, basing their opinion upon

their past experience, estimated that the annual profit which the Company would derive from the investment would be $574.09, equivalent to a net annual return upon the investment of eight-tenths of one per cent. (fols. 305, 797). This figure was reached upon the assumption that every house in the district to be supplied would be continuously occupied and would continuously use gas (fols. 583–4), although the experience of the Company is that in new territory not more than 60 per cent. of the residents use gas for any purpose (fols. 583, 600–1).

On an analysis of the figures furnished by the Company, made by the Commission's gas engineer, Mr. Hine, the annual net profit upon the investment would amount to $1,660, equivalent to an annual net return of 2.70% (fol. 505). These figures made by Mr. Hine did not take into consideration the interest paid by the Company on borrowed money (fol. 564), which amounted to $42,474.43 (fol. 801).

Commissioner Maltbie, who wrote an opinion which overlooked many of the essential factors entering into the problem, thought that the return on the investment would be from 3½% to 4½% (fols. 103–4). He also disregarded the interest paid on the indebtedness of the Company (fol. 102).

There are not more than 225 houses in the Douglaston district, where gas would be used if the extensions were made (fols. 188–90, 306). That the inhabitants of that locality are not in serious need of gas may be inferred from the fact that *not one of the houses there is piped for gas* (fols. 193–5, 203, 207, 213) and that no consumer as such was called as a witness. *The houses are all lighted by electricity supplied by another company ;* and the only use to which gas would be applied, if it were furnished, would be for cooking, and, possibly to some slight extent, for heating (fols. 191, 194, 203–4, 213, 221, 268) ; and it would be used for cooking, according to the Company's experience, only during the summer months, coal ranges being preferred in the winter months owing to the necessity for greater continuous heat (fols. 318, 432). If the inhabitants

do not care to use coal ranges for cooking in the summer months, there is no reason why they should not supply themselves with electric ranges.

In Flushing and its immediate vicinity, 85% of the existing consumers is the extreme maximum of those who use gas for cooking (fols. 317, 426), while the average in such cases is only 60% (fols. 583, 600-1); and those who use it exclusively for cooking and heating represent only about 6% of the entire body of consumers (fol. 426). In making its estimate of return on the investment, however, the Company assumed that gas would be used for cooking in every house (fol. 316).

The rate throughout the Borough of Queens is limited to one dollar for a thousand cubic feet (L. 1905, Ch. 125), while in the territory directly adjacent, to the east, which includes Great Neck, the rate is $1.50 (fol. 359).

The order of the Commission was unlimited in its sweeping requirements for the extension of mains and services, although it was admitted on the hearing that at least some of the streets had not been dedicated to the public (fol. 258) nor accepted by the City (fol. 273).

Even under existing conditions, the Gas Company has been unable to pay any dividends (fol. 612). The Commission did not take the trouble to inquire what the Company was earning on its present investment, nor what effect this large expenditure might have on the Company's ability to meet its existing obligations, including its bonded indebtedness, which apparently amounted to at least $800,000 (fol. 801).

The Appellate Division, upon a review of the evidence concluded that the cost of the proposed extension would amount to $60,000 or $70,000, and that, on the most favorable estimate, the Company could not obtain a return upon the investment of more than $1,660, or less than 2½% (p. 277); and the Court of Appeals seems to have accepted these figures (p. 282).

III. An unfounded assumption that was made in estimating the number of possible consumers was that the Gas Company would have the right to occupy every street and to supply every house in the community; and the order of the Commission required the Company to extends its mains and connections accordingly (fols. 50–60). Not only was there no evidence produced that every street in the locality was public, but, on the contrary, the evidence established showed that a considerable number of the streets had not yet been opened. A portion of the territory was a farm, purchased by a development company in 1907, when there were only two houses on it, the development of which was not commenced until 1909 (fol. 200). The map on which reliance was placed by counsel for the Commission was only a "tentative" map, which would not become final for two years. Some of the streets had not even been dedicated to the public (fol. 258), and others had not been accepted by the City (fol. 273). Consequently, from all that appears, the most valuable patronage of the Company might be that which would be derived from residents in those streets that had not yet been made public; and it is a mere matter of conjecture whether the number of houses to be supplied would be 225 or 25, and whether the greatest possible return would be 2½%, or whether the operation would have to be conducted without any return whatever.

THIRTEENTH.

The Company owed no duty to the Douglaston community.

I. This Court has expressed the opinion that a regulation of rates charged by a gas company, which would not allow a

return of at least 6% upon the investment, might be confiscatory.

Willcox v. Consolidated Gas Co., 112 U. S., 19, 49, 50.

That expression was made of a Company which the Court recognized (p. 49) as one of the most fortunately situated in the country.

II. It does not follow from the foregoing that, in every instance, a public service corporation can be relieved from complying with the requirements of the legislature or a commission, merely because the act to be done will not result in an adequate return upon the amount required to be expended. If the corporation owes a *present* duty to those whom it serves, it may be required to perform that duty, even at a loss. A public service corporation is bound to render efficient service to all who are actually dependent upon it; and it cannot evade that duty on the plea that it will not be profitable to do so in some particular instance. If, for example, two trains are required to transport the passengers and freight of a railroad company properly, instead of having one mixed passenger and freight train, the plea of poverty will not be accepted as an excuse for the nonperformance of this duty.

Missouri Pac. R. Co. v. Kansas, 216 U. S., 262.

If the public which is dependent upon a railroad cannot be accommodated unless an additional train is run, the company will be required to perform that duty to its existing patrons, and run an additional train, even though it may have to do so at a loss.

Atlantic Coast Line v. North Carolina R. R. Comm., 206 U. S., 1.

In that case, the Court said (p. 24), that the question involved was concerned "solely with an order directing a

carrier to furnish a facility which it is part of its general duty to furnish for the public convenience."

III. The case at bar is entirely different from the cases cited and other cases of that kind. In all those cases, the question involved was whether the company was properly supplying the needs of those who were directly and presently dependent upon it. But there is nothing of that kind involved in this case. Douglaston and Douglas Manor are distinct and independent communities, remote from the scene of operations of this Gas Company, and so separated by physical barriers that the Douglaston community can never become a homogeneous part of the development of Flushing.

IV. Commissioner Maltbie thought that the Gas Company did owe a present duty to the Douglaston community, because its charter gave it the right to do business in Queens County, which is coterminus with the present Borough of Queens (fol. 83) ; and the Court of Appeals was of the opinion that it was the duty of the Company to supply the needs of the Douglaston community, "if practicable" (Record, p. 282). As authority for that statement, the Court cited two decisions :

People *ex rel.*, Woodhaven Gas Light Co. v. Deehan, 153 N. Y., 528 ;

Wisconsin, etc., R. R. Co. v. Jacobson, 170 U. S., 287.

Neither case is in point.

1. In the Woodhaven case, there was no question whatever involved as to the obligation of the Gas Company to supply gas to any one. The only question considered was whether a gas company, which had a franchise to lay mains in the Town of Jamaica, had the *right* to lay mains in the Village of Richmond Hill, which was originally a portion of the town, but had

been subsequently incorporated as a village; and the Court held that it did have such right.

2. In Wisconsin, etc., R. R. Co. v. Jacobson, two railroad companies were required by the Railroad Commission of Minnesota to make track connections at a point of intersection, at grade, of their tracks. The order was made in accordance with the terms of a statute, which expressly directed that all common carriers should provide track connections at all points of intersection at grade, where it was practicable and necessary for the interests of traffic. The facts established, as the Court said, showed that there was "ample evidence" of the necessity of the track connection. A pure question of fact was thus involved, under an express statutory mandate; and the decision has no bearing upon the legal question whether a gas company, which is empowered to operate in a particular town or county, is under obligation to supply all of the residents of that town or county with gas.

V. It is quite clear that under the New York statutes and decisions, the plaintiff in error did not owe any duty to supply gas to the Douglaston community, merely because, under its charter, it had the right to engage in the business of manufacturing and supplying gas at any place in the Borough of Queens. The statute is explicit, that no gas company can exercise its right to supply a community with gas until it has obtained the consent of the municipal authorities of that community to lay its mains and connections. The statutory provisions on this subject are contained in Sections 60 and 61 of the Transportation Corporations Law, and are as follows:

"§ 60. *Incorporation.* Three or more persons may become a corporation for manufacturing and supplying gas for lighting the streets and public and private buildings of cities, villages and towns in this state, or

for manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this state, or for two or more of such purposes, by making, signing, acknowledging and filing a certificate stating the name of the corporation, its objects, the amount of its capital stock, the term of its existence not to exceed fifty years, the number of shares of which the stock shall consist, the number of directors not less than three nor more than thirteen, the names and places of residence of the directors for the first year, and the names of the towns, villages, cities *and counties* in which the operations of the corporation are to be carried on, and thereupon the persons who shall have signed the same, their associates and successors shall be a corporation by the name stated in the certificate.

"§ 61. *Powers.* Every such corporation shall have the following additional powers:

"1. If incorporated for the purpose of supplying gas for light, to manufacture gas, and to acquire by purchase or otherwise natural gas and to sell and furnish such quantities of gas as may be required in each city, town and village named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in such city, village or town, *with the consent of the municipal authorities thereof*, and under such reasonable regulations as they may prescribe."

From the foregoing, it appears that a gas company may be incorporated under the New York statute to operate *in every county of the State*, but that it cannot commence its operations in *any* city, village or town, without first obtaining the consent of the municipal authorities. This consent is recognized by the New York courts as a "secondary" or "special" franchise.

Matter of Long Acre Co., 188 N. Y., 361, 367–8;
People *ex rel.*, Metropolitan Street Ry. v. Tax Commissioners, 174 N. Y., 417, 435–6.

The legal effect of this required consent is the same as if the local authorities granted the entire franchise to engage in the business.

> Ghee v. Northern Union Gas Co., 158 N. Y., 510, 513.

It was this secondary or special franchise that was made the subject of taxation under a statute which this Court held to be constitutional.

> Metropolitan Street Ry. Co. v. New York, 199 U. S., 1;
> Consolidated Gas Company v. New York, 199 U. S., 53.

It cannot be pretended that merely because a gas company is organized with power to do business in every county in New York, the Legislature or Commission can compel it to supply gas to every county in the State. It owes no obligation to any portion of the public except that particular portion in which it is operating with the consent of the municipality. Therefore, even though the plaintiff in error had the charter power to conduct its operations throughout the County of Queens, it could not exercise that power in any particular community without the formal consent of the municipal authorities of that community.

> Ghee v. Northern Union Gas Co., 158 N. Y., 510, 513.

In other words, it owed a duty only to that community in which it was actually carrying on its business. In the case of the plaintiff in error, that community was Flushing (fols. 298, 406). There is not a particle of evidence in the record tending to show that the plaintiff in error has the right to lay its mains in any of the public streets of Douglaston. But even if it had that right, it would not follow that it had the power to exercise it. Queens County extends from Long Island Sound on the north to the Atlantic Ocean on the south, a

distance of at least fifteen miles; but no one would for a moment contend that because a company was operating in Flushing, on the north side of the Island, it could be required to "extend" its system so as to supply Rockaway Beach, many miles distant on the south side; and because a gas company had the right to do business in the City of New York and had started its operations in the Borough of the Bronx, no one would contend that it could be obliged to furnish gas to the residents of the Borough of Richmond (Staten Island), a part of the City fifteen or twenty miles distant.

To require the plaintiff in error to supply Douglaston with gas was to require it to do something for the benefit of a few real estate adventurers who were in no way entitled to the service.

Missouri Pac. Ry. v. Nebraska, 217 U. S., 196.

As this Court said, in Northern Pac. Ry. v. North Dakota (235 U. S., 585, 604):

> "The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed."

VI. From the foregoing, it is obvious that the plaintiff in error was under no legal obligation to supply the Douglaston community with gas, and that an order directing the Company to do this at a great loss would, if enforced, deprive the Company of its property without due process of law. It would be an unwarrantable interference with the business policy of the Company, in the enlargement of its business, and would be a clear confiscation of its property. A construction of the powers of the Public Service Commission leading to such a result would be in direct contradiction to previous decisions of the Court of Appeals.

People *ex rel.* Del. & Hud. Co. v. Stevens, 197 N. Y., 1, 10;

People *ex rel.* Binghamton L. H. & P. Co. v. Stevens, 203 N. Y., 7;
People *ex rel.* N. Y. Central R. R. Co. v. Public Service Commission, 215 N. Y., 241.

In the New York Central case, where the Commission had made an order reducing local commutation rates, the Court of Appeals, in affirming the order of the Appellate Division annulling the determination, said, in the opinion written by HISCOCK, J., now the Chief Judge of the Court, who granted the writ of error in the case at bar (Record, p. 288):

> "We cannot, however, refrain from suggesting the view that the Commission seems to have been influenced by what it deemed to be the wiser policy for the management of respondent's road, rather than to have confined itself to the consideration of the sole question whether the rates charged by the respondent were *unreasonable* or not. There is no express finding that the new rates were unreasonable; there is a long discussion of the benefits which the Commission thought would result to the respondent from adopting a policy of low commutation rates. In this course, it took into account considerations which were really not before it. *The question what general policy should be adopted by the respondent in developing suburban trade was one to be decided by it and not the state.* The methods and rates which it should apply to the development of any policy were subjects for regulation; but the question whether the welfare of the road would be best subserved by one policy or another, was a subject to be decided by the officers and stockholders of the corporation. It seems to me the Commission was more or less influence by this consideration, which was irrelevant."

The same view was expressed by this Court in Wisconsin, etc., Railroad Company v. Jacobson (179 U. S., 287), where the Court said (p. 297):

> "While this power of regulation exists, it is also to be remembered that the legislature cannot, under the guise of regulation, interfere with the proper conduct

of the business of a railroad corporation in matters which do not fairly belong to the domain of reasonable regulation."

FOURTEENTH.

Comments on brief of defendants in error.

I. It is scarcely accurate to state (brief, p. 5), that the decision of the Court of Appeals was unanimous. The Record shows (p. 283) that Judge HISCOCK (now the Chief Judge of the Court) did not vote, which means that he did not concur in the decision of his associates.

II. The brief of defendants in error concedes (p. 6) that the construction placed by the Court of Appeals on the provision of the Public Service Commissions Law, conferring power upon the Commission to grant reasonable extensions meant, "that the Commission had power to order extensions, which *in the opinion of the Public Service Commission* (the italics are their own) were reasonable".

In other words, here is a clear admission that the Court of Appeals held, not that the regulation of the Commission must be reasonable in itself, but merely that it must be what the Commission deemed to be reasonable.

This is brought out still more clearly on the next page of the brief (p. 7), where, after referring to the provisions of the New York statute permitting a review of the determination of the Commission by a writ of *certiorari*, it is stated:

> "The effect of the decision of the highest Court in New York was so to interpret these two state statutes that it is now settled law that the Commission may order such extensions of gas mains as are reasonable in its (the Commission's) opinion, and that the Court in reviewing the Commission's order, may not substitute its own opinion of what is reasonable for the Commission's deliberate decision on that point."

And later, in their brief, the point is still further emphasized, as follows (p. 13):

> "The Court of Appeals * * * held that the function of the courts was not to weigh the evidence anew, but only to decide whether, under the wording of Section 2140 of the Code, the Public Service Commission had proceeded in a proper manner and reached a conclusion that *might* be supported by the evidence."

It is thus perfectly clear, on the showing of counsel for the defendants in error, that the Court of Appeals did disregard the principle repeatedly laid down by this Court, that the legislature, in its regulation of public service corporations, is limited to that which is reasonable, and that it is for the courts to determine what is reasonable (see *ante*, pp. 2-5).

III. The impression is sought to be conveyed (brief, p. 9), that the plaintiff in error had a secondary or special franchise for the whole of the Borough of Queens. The references to the Record, however, make it clear that the franchise referred to was the general franchise conferred by the charter, and not the special franchises covering the different and widely separated communities in the thinly populated Borough of Queens.

IV. Counsel for the defendants in error concede (brief, p. 11) that "every regulatory act of a public service commission may, in a sense, be said to deprive the company of its property, if, by order, the Company is compelled to expend money"; but they assert that there can be no ground of complaint even if the return be insignificant, if the expenditure is required in the performance of a duty to the public. That is undoubtedly true; but it must appear affirmatively that the duty is presently owing in respect to the act required to be done. As we have already shown (*ante*, p. 28), the plaintiff in error owed no duty to the Douglaston community.

V. It is contended in the brief for the defendants in error (p. 14), that this Court, in order to reverse the State Court, "must find as a general rule of law that all extensions or improvements ordered by State Commissions that produce an immediate return of only 2½% upon their cost are unlawful as constituting a taking of property without due process of law." This proposition is regarded by counsel as a "startling suggestion." It would not have seemed so startling, if they had read the decisions of this Court, holding that it will consider the facts in each case to determine whether a public service corporation is obliged to comply with any particular regulation at a loss. The quotations from Atlantic Coast Line v. North Carolina Corporation Commission (206 U. S., 1) expressly recognize that it is only when a *present* duty is owing to the public actually served that the question of return may be disregarded as to a detail of the service rendered by the corporation; and, in the concluding sentence of the quotation, this Court expressly recognized that "an obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the service required and the public need of its performance." In other words, the entire situation will be considered, to ascertain whether there is a present duty owing to the public, which must be complied with even though it may not give an adequate return upon the expenditure.

VI. The entire contention of defendants in error is based upon the premise that the plaintiff in error owed a present duty to the Douglaston community (Brief, p. 19). As we have heretofore shown, it not only did not owe a duty to that community, but it did not even have the legal right to lay its mains in the streets.

VII. The sensitiveness of the Commission in the case at bar to any criticism is seen in the suggestion made by counsel,

that the writ of error was obtained from the Chief Judge of the Court of Appeals for purposes of delay (Brief, p. 21). Is it then *lèse majesté* to question the decisions of such tribunals or to suggest that, in their zeal for regulation, they may at times overstep the limitations of the Federal Constitution?

FIFTEENTH.

The motion should be denied.

Washington, May 21, 1917.

JOHN A. GARVER,
Counsel for plaintiff in error.

PEOPLE OF THE STATE OF NEW YORK EX REL. NEW YORK & QUEENS GAS COMPANY *v.* McCALL ET AL., COMMISSIONERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 407. Argued November 6, 7, 1917.—Decided December 10, 1917.

An order of a state public service commission requiring a city gas company to extend its mains and service pipes to meet the reasonable needs of a growing community within the city can not be deemed arbitrary or capricious, and so contrary to the due process clause of the Fourteenth Amendment, where it appears that the company was accorded full hearing before the commission and on review in the state courts, that it is the only one authorized to serve the community in question with gas, and that the rate of return upon the cost of the extension, though low initially—from 2¼% to 4% per annum—, will probably soon become ample with the growth of the community; and

where, moreover, the record does not show, and the company does not claim, that the comparatively small loss asserted would render its business as a whole unprofitable.
171 App. Div. 580; 219 N. Y. 84, 681, affirmed.

THE case is stated in the opinion.

Mr. John A. Garver for plaintiff in error.

Mr. Godfrey Goldmark, with whom *Mr. George S. Coleman*, *Mr. Arthur DuBois*, *Mr. William L. Ransom* and *Mr. George H. Stover* were on the briefs, for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

It sufficiently appearing that the Court of Appeals retained practical control over the record and judgment in this case, while the motion for reargument in that court was pending, the motion to dismiss the writ of error, on the ground that the application for it came too late, will be denied, and the case will be disposed of upon its merits.

The Public Service Commission of the State of New York for the First District ordered the New York & Queens Gas Company to extend its gas mains and service pipes in such a manner as would be "required reasonably to serve with gas" the community known as Douglaston, including Douglas Manor, which was located about a mile and a half beyond the then terminus of the company's gas mains, but within the Third Ward of the Borough of Queens, City of New York.

When this order of the Public Service Commission was reviewed by the Supreme Court at the Appellate Division, that court assumed that it had authority to review generally the reasonableness of the order of the Public Service Commission, and upon such review found the order unreasonable and annulled it.

From the decision of the Appellate Division an appeal was taken to the Court of Appeals, which reversed that decision, and held that the Appellate Division had no power under the New York law to substitute its own judgment for the determination of the Public Service Commission as to what was reasonable, under the circumstances of the case. The case is now in this court for review of the judgment entered upon the decision of the Court of Appeals and it is presented upon a single assignment of error, viz: "That the order of the Public Service Commission . . . was illegal and void, in that it deprived the above named New York and Queens Gas Company of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the said company to extend its distributing system, under great physical difficulties and at enormous expense, to an independent and remote community which the said company was under no present duty to supply with gas, when it appeared that the said Gas Company would not obtain an adequate return from the expenditure required to make such extension."

More compactly stated, this assignment of error is, that the order deprived the gas company of its property without due process of law, because obedience to it would require an expenditure of money upon which the prospective earnings would not provide an adequate return.

The Court of Appeals of New York decided that the Public Service Commission was created to perform the important function of supervising and regulating the business of public service corporations; that the state law assumes that the experience of the members of the Commission especially fits them for dealing with the problems presented by the duties and activities of such corporations; that the courts in reviewing the action of the Commission

have no authority to substitute their judgment as to what is reasonable in a given case for that of the Commission, but are limited to determining whether the action complained of was capricious or arbitrary and for this reason unlawful; and that it was clearly within the power of the Commission to make the order which is here assailed.

This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that State to review the decision of the Public Service Commission, based as it is in part on the decision in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470, differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination. Typical cases are: *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481–494; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 443–4; *Louisiana R. R. Commission* v. *Cumberland Telephone & Telegraph Co.*, 212 U. S. 414, 420–2; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541–547, and *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668.

It is the result of these and similar decisions, that while in such cases as we have here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or

capricious action on the part of the Commission as to violate the due process clause of the Constitution.

The result of the application of this rule to the record before us cannot be doubtful. The Gas Company appeared at the hearing before the Commission, cross-examined witnesses, introduced testimony and argued the case. On writ of certiorari the case was reëxamined by the Appellate Division of the Supreme Court, and it was again reviewed on appeal, by the Court of Appeals. In the matter of procedure plainly the company cannot complain of want of due process of law.

The record shows that the company at the time of the hearing had franchises authorizing it to manufacture and sell gas throughout the Third Ward of the Borough of Queens, in the City of New York, and that, it being the only company which had franchises for any part of that area, the community to which it was ordered to extend its distributing system must continue without gas if the order does not become effective.

The community of Douglaston, including Douglas Manor, was a rapidly growing settlement of three hundred and thirty houses, of an average cost of $7,500, thus giving assurance that the occupiers of them would be probable users of gas, and which, with very few exceptions, were occupied by families the entire year. While the community is described in the assignment of error as "independent and remote" the record shows that it was served at the time by franchise holding companies, which supplied water, electric light and telephone to its inhabitants, and that the number of houses had doubled within a few years.

The length of the extension ordered was about one and one-half miles but the mains of the company, which extended to the point nearest to Douglaston, were being used to almost their full capacity, and for this reason the estimated cost of making the improvement included new

mains of some eight miles in length. The engineer of the Gas Company testified that the cost of the ordered extension would be approximately $86,000, while the engineer for the Commission estimated the cost at $61,000. The Commission found that only $45,000 of the new investment required would be properly chargeable against the extension ordered, since the newer and larger mains would be available in part for other business.

On the basis of the company's estimate of the cost of the extension the income would be about 2¼% per annum, and, on the basis of the estimate by the Commission of the part of the cost properly chargeable to the Douglaston community the income would be 4%. There is no showing in the record as to the fair value of the entire property of the Gas Company used in the public service, nor of the rate of return which it was earning thereon, and therefore even if the return on the cost of complying with the order be conceded to be inadequate, this would not suffice to render the order legally unreasonable. *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 24–6; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574, 580.

It is significant also that within a year preceding the hearing by the Commission the Gas Company proposed in writing to the residents of Douglaston that it would extend its mains to the settlement if they would advance $10,000, to be returned in semi-annual credits upon the amount of gas consumed.

These references to the evidence will suffice. They show this Public Service Commission ordering a public service corporation to render an important public service, under conditions such that in the aspect least favorable to the Gas Company the initial return upon the investment involved would be low but with every prospect of its soon becoming ample, and also that no claim was made by the

company that the comparatively small loss which the company claims would result would render its business as a whole unprofitable.

Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents, and we agree with the Court of Appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the Commission as to the expediency or widsom of the order, they are without authority to substitute for its judgment their views of what may be reasonable or wise. Since no constitutional right of the plaintiff in error is invaded by the order complained of, the judgment under review must be

Affirmed.